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PANEL II: Licensing in the Digital Age: The Future of Digital Rights Management

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PANEL II: Licensing in the Digital Age: The Future of Digital Rights Management

Moderator: Hugh C. Hansen*
Panelists: Marybeth Peters†
 Joseph Salvo‡
 Fred Von Lohmann§

MR. STRATTON: Good morning. My name is Matthew Stratton. I am Managing Editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal*. On behalf of the *Journal*, I welcome our guests and thank the distinguished panelists of our second panel, entitled “Licensing in the Digital Age: The Future of Digital Rights Management.”

It is my pleasure to introduce the panel’s moderator, Professor Hugh Hansen, Professor of Law at Fordham. The *Journal* is grateful for Professor Hansen’s assistance in putting together this Symposium.

PROF. HANSEN: Thank you, Matt.

Because our speakers’ bios are in the materials, to save time I will introduce them with just their names and titles. Joseph Salvo, Vice President and Senior Counsel of Sony BMG Music Entertainment; Marybeth Peters, Register of Copyrights; and Fred von Lohmann from EFF, Electric Frontier Foundation, where he is Senior Staff Attorney. I am Hugh Hansen—I teach here at Fordham Law School, and I will be the moderator.

Marybeth is laughing because—

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MS. PETERS: I know you.

MR. VON LOHMANN: Reason enough, isn't it?

PROF. HANSEN: I think Marybeth is aware that I am a proactive moderator, and will give my opinion if there is time and it is appropriate. It usually turns out that there is time although some might prefer that there were not.

DRM, or digital rights management,¹ is a fascinating topic. If you take its plain meaning, DRM is how one manages rights in a commercial, digital marketplace. Yet, in practice it is a term used to cover many copyright issues. It has become something of a Rorschach test. How people define it and react to it says a lot about their views in general of the role of copyright in the digital context.

In the analog world, it was fairly straightforward and non-contentious. One had authors and copyright owners, publishers, record companies, motion picture companies, consumers and just about everybody else who were not aware of copyright issues because they had no obvious impact on their lives. Technology began to change that. First, analog technology such as videocassettes and audio cassettes allowed cultural products to be readily accessible and to move easily—and move for the first time to consumers in their homes around the world. This produced vast potential markets and made copyrighted products a bigger player in bottom line analysis.

Intellectual property was not taught in the majority of law schools and where it was taught, it was a single course covering all the topics, usually taught by an adjunct. It was taught extensively in a few schools in New York and California, but even there it was considered a boutique area of the law. Today, it is taught

¹ Digital rights management (“DRM”) refers to technology that utilizes code to prevent piracy of intellectual property. See Peter Eckersley, *Virtual Markets For Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J.L. & TECH. 85, 88 (2004). (“DRM seeks to reinstate copyright in the online environment through the use of cryptography and ubiquitous ‘trusted systems’ to control the use of information in consumers’ homes—and most everywhere else.”). See *The World Wide Web Virtual Library: Digital Rights Management* [hereinafter “Virtual Library”], at <http://www.drm.uk.com> (last visited Apr. 30, 2005).

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everywhere with many lawyers practicing in these areas, even beyond the extensive IP bars in New York and California.²

In the analog world, more people were interested, but intellectual property was viewed positively by most people. New laws and treaties sought broader or deeper protection.

Today, because of the digital technology, everybody can access works, copy them and enjoy them in different modes. Because IP law does not allow unauthorized copying at will, many people from end users to online service providers and digital consumer electronic manufacturers have economic incentives to limit intellectual property law. We also have software creators and providers who, legally and illegally, greatly facilitate end user access to the copyrighted works easily.³ The list is growing as others such as wireless service providers see a role in providing consumers with copyrighted products.

What are the issues in DRM? There are a number of issues.

There are practical issues—what are the business models that are going to work? To what degree should consumer choices need to conform to copyright protection? There are important and difficult technical issues such as interoperability and standards which also sometimes implicate antitrust law. What role is there in a digital world for collective administration? Particularly in Europe, this question implicates competition [antitrust] law.

Even if you came up with solutions on a national level, would those work internationally? For instance, there are differences within Europe in IP law⁴ And we have differences with Europe in

² See New York Intellectual Property Association, at <http://www.nyipla.org> (last visited Apr. 30, 2005); The American Bar Association Section of Intellectual Property Law, at <http://www.abanet.org/intelprop> (last visited Apr. 30, 2005).

³ See, e.g., *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1157 (9th Cir.) (*cert. granted*, 125 S. Ct. 686 (2004) (holding that companies that sell file-sharing software are not liable for copyright infringement that results from use of the software over which they have no control); see also <http://www.grokster.com> (last visited Apr. 30, 2005).

⁴ See Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 434 (2001).

Europe does not have the luxury of a common intellectual property law, even with continuing legislative efforts at harmonization of national laws. Intellectual property rights are (with the one recent exception of a unitary supranational trademark that covers the entire territory of the EU) established

both IP and antitrust laws.⁵ But these differences are nothing compared to U.S. and European differences with the laws and regimes of many countries, particularly developing ones, throughout the world.⁶

Moreover, overlying all these IP issues, are issues of a fundamental nature such as the role of capitalism, redistribution of wealth, multinationalism, and globalization.

As fascinating as these issues might be, we obviously cannot discuss them all today but we will try to reach as many as we can.

Unfortunately, one of our speakers, an economist from NYU, Professor Ordover, at the last minute, was not able to participate. Economic analysis of a sort has been part of many discussions of copyright issues. Economic analysis, as presented by an economist, however, is relatively rare. So we regret that Professor Ordover cannot participate.

We have three speakers who will each have fifteen minutes to speak. After each speaker, we are going to have five minutes for questions from the audience that seek clarification of a point by a speaker, but not for the purpose of debate. That will come later. We should have at least forty-five or fifty minutes near the end of this session for questions of any kind and debate.

by national laws operating within a federal free trade area. In the EU, there is relatively more interest in the private international aspects of intellectual property law.

Id.; Dr. Silke von Lewinski, *Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39, 43-44 (1997).

⁵ Jason Karaian, CFOEurope.com *Release the Hounds* (Nov. 2004), at <http://www.cfoeurope.com/displayStory.cfm/3350505>.

In the US, 90% of antitrust enforcement actions come from private actors (companies suing companies), but in Europe the commission and national competition authorities do nearly all of the suing. In fact, only 60 private antitrust cases have gone to trial in Europe since the early 1960s. Of those, just 28 cases saw damages awarded.

Id.

⁶ See, e.g., Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535, 540-41 (1998). "When U.S. business people and government representatives called for new international intellectual property law creation, because many developing countries possessed weak institutions of intellectual property protection or none at all, developing-country governments signaled at the WIPO forum that they wanted no part of reformed international intellectual property institutions." *Id.*

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Marybeth, would you start off, please?

MS. PETERS: Thank you.

I want to make an apology on why I am here. I am the government person and I do not actually deal with these issues on a day-to-day basis. But when you wanted someone from the Copyright Office, my staff all said, “Marybeth cares more about licensing than us, so she is the one.” So I am actually going to talk to you from a little bit broader perspective than digital rights management.

I want to really focus on the fact that in a digital environment, especially in an online digital environment, licensing is more important than it ever has been before.⁷ There has always been licensing of performance rights,⁸ but when the primary way in which you made works available was by the sale of that physical object—and that was not licensed, it was sold. Once it was sold, that was the end of controlling the distribution chain of that book—people did not license that. But today, when you get it online, you get an e-book online, or you are at a library and you are getting electronic journals.⁹ How do you get them? You get them through licenses.

I can tell you, working in a library, the people who are dealing with these licenses are very unhappy. It really has to do with the legal structure, which is the copyright law itself, which sets out what the rights are and the limitations on those rights,¹⁰ and a contract that can basically restrict some of the acts that might be

⁷ See Sean Daly, *10 Million iPods, Previewing the CD's End*, Wash. Post, Feb. 13, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A19831-2005Feb12.html> (Licensing music, enabled by lawful downloading, has led to a drastic decrease in CD sales, and rapid increase of music downloading. “During the second half of 2004, more than 91 million digital tracks—songs downloaded from the Internet—were sold, compared with 19.2 million in the same period in 2003. That’s an increase of 376 percent.”).

⁸ See *Broad. Music, Inc. v. CBS, Inc.*, 441 US 1, 20-21 (1979); see also 17 U.S.C. § 106 (2002).

⁹ See Eckersley, *supra* note 1, at 113. “Furthermore, the likelihood that DRM will ever work for writing seems much lower than for more complicated information goods. At present, the only thing holding off a digital publishing crisis is the fact that electronic devices remain far less convenient for reading than ordinary, printed books.” *Id.*

¹⁰ See 17 U.S.C. § 106-112 (2002).

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legal under the law.¹¹ In fact, on the other end, of course, where there are rights, they can be given away to the library at no cost. So it is more a negotiated kind of environment.

But most libraries, most educational institutions, see copyright owners as the gigantic gorilla that comes into the room to deal with the little library. Now, working in a library, I can tell you when they band together, they are as big as the big gorilla. So licensing is absolutely critical in a digital environment.

Now, there are obviously the kind of licenses that are given by copyright owners to new service providers, some of the ones that Hugh was talking about. Apple iTunes is a service provider; they provide the music service, iTunes.¹² Microsoft now has a music service¹³ and RealNetwork has a music service.¹⁴

And then there is the digital rights management piece, which really deals much more with the end-user and what the end-user can and cannot do.

Digital rights management is simply a tool. It is a system that includes technological measures that allow for specific terms of use, what you can and cannot do, and then the ability to monitor that use and to get payment for that use.¹⁵

There is also a key piece of it that deals with the security of the content. This is when you use a technological protection measure and you lock it up so it cannot be changed. There are some enforcement pieces that go into that, but we are focusing on the beginning part, which really deals with the licenses.

¹¹ See generally Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKLEY TECH. L.J. 93 (1997) (arguing that contracts attempting to expand federal copyright protection should be unenforceable).

¹² Apple iTunes Music Store at <http://www.apple.com/itunes/store> (last visited Apr. 30, 2005).

¹³ MSN Music at <http://beta.music.msn.com/> (last visited Apr. 30, 2005).

¹⁴ RealRhapsody Music Service at <http://www.real.com/rhapsody> (last visited Apr. 30, 2005).

¹⁵ See Wikipedia, *Digital Rights Management*, at http://en.wikipedia.org/wiki/Digital_rights_management (last visited on Apr. 30, 2005). “[DRM] is an umbrella term for any of several arrangements which allows a vendor of content in electronic form to control the material and restrict its usage in various ways that can be specified by the vendor.” *Id.*

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In DRM, it is the expression of the usage rules in two key parts. One is, you need an identifier for a work, and standard identifiers become critical. So something like the International Standard Book Number (ISBN)¹⁶ is important and the International Standard Registrant Code (ISRC)¹⁷ is a critical identifier. With regard to text and some other works, there is a Digital Object Identifier (DOI).¹⁸ But you need these standard identifiers so when you go from system to system you can basically search the same way and get sort of the same results.

The other thing is that in this environment, everything really needs to be interoperable. You cannot have users having to apply different rules and different things based on what the particular DRM is. They have got to work all together.

Although copyright is exclusive as a right, and that is important, in the digital environment and especially in the music industry, you basically have to enable all of the services. So you have to license everybody. These basic services are going to compete with each other—it is all about competition. So there is Apple iTunes, there is RealNetwork, that have some services; there is Microsoft—and they are all going to compete for value-added, but they have to have all of the content. You are not going to go to a service if it does not have all of the things you want. So it really is switching to making everything available to everybody on terms and conditions that you have to basically work out.

I think you mentioned it, and I know my fellow colleagues are going to mention it: concerning DRM and these licenses—it is all about how people like Joe are going to make his product available

¹⁶ See The International ISBN Agency, *What is an ISBN?*, at <http://www.isbn-international.org/en/whatis.html> (last visited Apr. 30, 2005) (“[ISBN] is a unique machine-readable identification number, which marks any book unmistakably.”).

¹⁷ See International Federation of the Phonographic Industry (IFPI), *The International Standard Recording Code*, at <http://www.ifpi.org/isrc/> (last visited Apr. 30, 2005). “[ISRC] is a unique and permanent identifier for a specific [sound or music] recording which can be permanently encoded into a product as its digital fingerprint.” *Id.*

¹⁸ See The International DOI Foundation, *Welcome to the Digital Object Identifier System*, at <http://www.doi.org/> (last visited Apr. 30, 2005) (“[DOI] is a system for identifying content objects in the digital environment”).

and what business model he is going to use.¹⁹ They are changing, and they do in fact have to change. They cannot stay the same. We are in an entirely new market.²⁰

We have to figure out what the people want, how they want to pay and what controls they will tolerate. I think they have been pretty vocal in a number of areas.²¹ We, certainly in the rule-making that we did, with regard to exceptions to access controls and the prohibition on circumventing access controls, learned that when dealing with e-books. Most people hate the controls that are on e-books; that they are tied to one particular machine; that you cannot move it from one machine to another, that frequently features that people want are disabled.²² People do not always like subscription models either; they do not like paying every time you download. Businesses have to figure out what licensing model is actually going to work for the consumer. So you have the rights, you certainly want to make the product available, but you have to give something to the consumer that they are willing to pay for.

For me the biggest excitement was Apple iTunes, because that was the very first time that I saw people actually willing to—in numbers that are significant—go to a legitimate service that could compete, even if it could not compete well. Although they actually license millions of songs, there are billions that are downloaded all of the time illegally.²³

¹⁹ See Bill Rosenblatt, DRM Watch: The Leading Resource for Digital Rights Management, *2004 Year in Review: Online Content Services*, (Dec 30, 2004), at <http://www.drmwatch.com/ocr/article.php/3453041> (reviewing information on various business model trends in the downloadable music industry).

²⁰ See Jim Farber, *In Tune With the Times: Pop charts give downloads a voice*, N.Y. DAILY NEWS, Feb. 8, 2005, at 43 (giving an overview of recent market changes in the sale of popular music).

²¹ See Katherine Reynolds Lewis, *Consumers Fight System Protecting CD Copyright*, SEATTLE TIMES, Mar. 18, 2002, at C3 (discussing consumer frustration with the home-use right limitations sellers place on their products).

²² See, e.g., *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 111 (N.D. Cal. 2002) (Elcom created software which circumvented the DRM that protected ebooks).

²³ See Press Release, International Intellectual Property Alliance, Copyright Industries Release Report on Piracy in 67 Countries/Territories and Press their Global Trade Priorities for 2005 (Feb. 10, 2005), at http://www.iipa.com/pressreleases/2005_Feb10_SPEC301_PR.pdf. “[T]he U.S. copyright-based industries suffered estimated trade losses due to piracy in these 67 countries/territories of \$13.4 billion in

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So that is sort of where we need to go. Whether it is a subscription base, whether it is a pay per download, whether it is a pay per listen, it is going to be working it out with the consumers.

Collecting societies²⁴—actually I spend a lot of time with collecting societies abroad, and they of course are involved in the development of DRM, digital rights management, because they have huge administrative operations.²⁵ They license, they have to report use, and they have to distribute money.²⁶ Digital rights management systems help them do all of that.

They also have to basically license across borders. That has become an interesting issue because they thought they worked out a solution in the European Union. Their anti-competition rules, as you mentioned, basically told them that their solution was not going to work. But they actually are big players in digital rights management.

Concerning music, you have an article by the editor of your Intellectual Property journal that talks about DRM,²⁷ and there are articles that are very good at pointing out where DRM is, especially with regard to music, which is not there yet. It is starting, but it is not there yet—but it will be an important player, because for copyright owners you have to have a safe environment in order to make your works available online.²⁸ One of the ways to do it is to have secure digital rights management in place.²⁹

2004.” *Id.*; see also www.apple.com/itunes (last viewed March 30, 2005) (noting sales of more than 300 million songs).

²⁴ See generally <http://www.ascap.com/about> (last visited Apr. 30, 2005); <http://www.bmi.com> (last visited Apr. 30, 2005). Collecting societies, like BMI and ASCAP, help authors manage their rights as well as collect and distribute fees for them.

²⁵ See British Music Rights, *Issues and Opinions: Digital Rights Management: Informal Consultation of the Final Report on the High Level Group: British Music Rights comments* (Sept. 20, 2004), at <http://www.bmr.org/html/submissions/submission103.htm>.

²⁶ See Aidan White, *Creators’ Forum Conference: Digital Rights and Collective Management* (Feb. 19, 2004), at <http://www.ifj.org/default.asp?index=2283&Language=EN>.

²⁷ Andrew Sparkler, *Senators, Congressmen, Please Heed the Call: Ensuring the Advancement of Digital Technology Through the Twenty-First Century*, 14 *FORD. INTELL. PROP. MEDIA & ENT. L.J.* 1137 (2004).

²⁸ See *id.* at 1138.

²⁹ *Id.* at 1149-50.

The issues in music I think are more difficult than any other type of content. Sometimes it is the law itself that can be a barrier to licensing or make it more difficult.³⁰

One of the things that we in the United States have is some statutory licenses dealing with music.³¹ One of them, which deals with the making of phono records³²—in other words, you have a sound recording that is embodied in a disc, or it could be an MP3 file—there is a statutory license for that. People do not use it, but it does set the outer limit.

It worked very well as long as what we were doing was making new recordings. So Joe brings out a recording and Fred actually wants to use the same song and he wants to bring it out. There was a statutory license that said as long as you are doing this for private use and you pay the royalty, you can do it.³³ That basically enabled a voluntary license to go into place that was less restrictive than what was in the law.³⁴

But it got very confused when in 1995 they amended it to cover digital phonorecord deliveries.³⁵ So it anticipated that instead of going to the record store and buying a CD, you could order a download—and it talked about digital phonorecord deliveries and it talked about that some of those would be incidental digital phonorecord deliveries.³⁶ Nobody knew what an incidental phonorecord delivery was.

Then we looked at what was going on. The activities—and you may be talking about this—were streaming,³⁷ which is where you hear something but you are not downloading it. But there are

³⁰ See Eckersley, *supra* note 1, at 86-87.

³¹ 17 U.S.C. §115 (2000).

³² 17 U.S.C. § 106(1) (2000 & Supp. 2002)

³³ 17 U.S.C. § 115.

³⁴ See *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing* at http://www.eff.org/share/collective_lic_wp.php (last visited Feb. 16, 2005) (proposing an alternative licensing arrangement that facilitates music downloads).

³⁵ Digital Performance Rights in Sound Recordings Act of 1995, Pub. L. 104-39, 1995 U.S.S.C.A.N. (109 Stat.) 336-39 (codified in scattered sections of 17 U.S.C.).

³⁶ See 17 U.S.C. § 115(c)(3)(C) (2000 & Supp. 2002).

³⁷ See, e.g., Chris Schmidt, *Real Streaming Audio*, PC PLUS, July 2003, available at <http://www.pcplus.co.uk/tutorials/default.asp?pagetypeid=2&articleid=17909&subsectionid=376-&subsubsectionid=749> (last visited Apr. 30, 2005).

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services where I not only get what they are offering but I say, “I want to hear this song,” called on-demand streams,³⁸ that record companies and music publishers were concerned about because they thought it was going to cut the sales of their records.³⁹ And then actually what happens when you do not just get the music file forever but you get it for a month—it is a subscription service; you get it for one month—or it says that it will be downloaded but you can only play it three times, it is limited? What do you do? What are those things?

This went into the law in 1995,⁴⁰ and I can tell you that today we still do not know what they are. We have actually had proceedings in the Copyright Office trying to figure out what they are.⁴¹ There are issues dealing with the server copy. There are issues concerning when you get an on-demand stream or just a stream, there are copies that have to be made in order to listen to that work—what are they; are they encompassed within the statutory license? Nobody really knew the answer and nobody wanted us to determine the answer. They more or less came up with some agreement and then told us, “Okay, you put that in your regulations and you say that’s what the law is.” We said, “We can’t actually do that.”

There was a hearing last week to talk about what we could do to make the law clear, because unless the law is clear, it is very difficult to license. Uncertainty is very, very difficult in this kind of an arena.

We were asked by the committee to bring the parties together, to get them to identify the issues, to see if they could reach consensus. If they could reach consensus, we would draft the legislation. If they could not, we would tell them what went wrong.

³⁸ *Id.*

³⁹ David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works Via the Internet, Music and More*, 12 *FORD. INTELL. PROP. MEDIA & ENT. L.J.* 235, 255-56 (2001).

⁴⁰ Pub. L. 104-39, 1995 U.S.S.C.A.N. (109 Stat.) 336-39 (codified in scattered sections of 17 U.S.C.).

⁴¹ See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 64 *Fed. Reg.* 26, 6221 (Feb. 9, 1999) (to be codified at 37 C.F.R. pt. 255), available at <http://www.copyright.gov/fedreg/1999/64fr6221.html>.

All I will tell you is we met for three months. It was with the record companies, the music publishers, and the digital media companies who did a lot of streaming. We started out with a list of all of their issues—there were about fifteen. Despite meeting for three months, we resolved absolutely nothing, they could agree on nothing, and they could not agree on even how to word where they were. They prohibited us from writing it up, and so they ended up writing it up.

I will just give you a clue of what the outstanding issues are. The scope of the license, and whether or not you should have the license as it is or it should be a blanket license⁴²—in other words, instead of identifying a title and saying, “I’m going to use this title,” you basically say, “I’m going to make phonorecords of music and I’ll tell you what I do when I pay you.” If you go that way—and I can tell you the record companies wanted that and the digital media people wanted it, but the music publishers did not—they basically said, “We could live with it, but only for limited downloads and on-demand streams.”

The record companies wanted it to include not only all online services but physical products, because they are coming out with new things where there are no answers. What do you do about dual disc,⁴³ which basically has two recordings but you can only play one once; one goes to a dedicated machine and one goes to the computer. Music publishers say, “You pay us two royalties, even though one can only listen to a song once,” and they say,

⁴² See generally *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, at http://www.eff.org/share/collective_lic_wp.php (last visited Apr. 30, 2005) (proposing blanket licensing for music file sharing).

⁴³ For additional information on this technology, see Press Release, DVD+RW Alliance, New dual-layer DVD+R technology developed by Philips in cooperation with MKM increases DVD recordable capacity to 8.5 Gbytes, (2003) *available at* <http://www.dvdrw.com/press/duallayer.htm> (last visited Mar. 2, 2005).

Users will benefit from the additional storage capacity of the DVD+R disc as it will enable them to record 4 hours of DVD-quality video or 16 hours of VHS-quality video, without the need to turn over the disc. PC users will be able to archive up to 8.5 Gbytes of computer files on a single disc [. . .]The dual-layer DVD+R system uses two thin embedded organic dye films for data storage separated by a spacer layer [. . .] a variation in reflectivity as the disc rotates to provide a read-out signal as with commercially pressed read-only discs.

Id.

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“That’s outrageous.” At the end of the day, it is the music publishers that do not want to go there.

The digital media people say that it has to cover streaming,⁴⁴ that is really a performance and the copies that are being made only enable the performance. The music publishers say on-demand streaming—we say you have to deal with everything because a person who delivers that, delivers a regular stream as well as an on-demand stream.⁴⁵

The royalty payments—what should they be; how much should they be; should they be a percentage of royalties; should they be so many cents per whatever?

There were lots of disagreements about license terms—something called the control composition clause, which is that you pay only 75 percent of the royalty when the performer is the songwriter.⁴⁶ The music publishers said, “It has to go,” and the recording industry said, “Over our dead body, unless we get a deal that is really something that we want and think is wonderful.” The record companies sublicense and cover the music publisher in their dealings. The music publishers say, “No, we’ve got to get the licensing back and get the record companies out of it.”

And then there was the issue of money—how much would such a license cost?

Now, these are really just examples of the kinds of things that are going on in the music industry that they have not worked out that make it very, very difficult to license music. Our position in the Copyright Office is, “People, you have got to work this out. You cannot keep fighting each other. Lock yourselves in a room.”

⁴⁴ “[Streaming media] is the live distribution of music or video online in which no permanent copy is created on the downloader’s system.” Heather D. Rafter et al., *Streaming Into The Future: Music and Video Online*, 611 PLI/Pat 395, 400-401 (2000). “The quality of this music is lower than the quality of a CD. Many web sites selling music online offer audio streaming technology that provides the opportunity to preview clips from an artist in real time.” *Id.*

⁴⁵ See *id.* at 417 (“The recording industry often portrays the emerging availability of audio content on the Internet as a threat to copyright protection and an invitation to privacy.”).

⁴⁶ See *Controlled Composition Clauses*, at <http://www.ascap.com/musicbiz/money-clauses.html> (last visited Apr. 30, 2005).

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Now, we tried that. It did not work. I guess you have to lock them longer than three months.

But you have to enable this. If in fact, music is to survive—if in fact, copyrights are to be respected, then you cannot have the people who own the rights fighting with each other and saying, “Is it a performance? Is it a download? What are we licensing? What shouldn’t we license? How do we do it?” They need to just figure it out.

Thank you.

PROF. HANSEN: Thank you very much.

So, is it all hopeless, Marybeth?

MS. PETERS: No, because I do believe that there is a survival instinct in the music publishers.

PROF. HANSEN: Are you sure?

MS. PETERS: They just have not figured out what the survival pill is.

PROF. HANSEN: Yes? Can you state your name and affiliation? Wait also for the microphone.

QUESTION: Everett Carbohall [phonetic]. I’m an entertainment attorney here in the City.

Have you all set forth any deadlines after which you have said, “Come up with an agreement by X date or we’re going to promulgate some rules?”

MS. PETERS: We did that. We actually took all of the provisions that they identified as issues. We then thought we would carve then up so that everybody got something—it turns out we made a huge miscalculation—and we actually drafted what it would look like. We got a call from everybody who said, “You cannot send it out. We want nothing in writing. So you have to call each of us and just say it orally.”

Then they wrote it down and then they came back and we had a discussion. Actually we gave too much to the music publishers, so they said, “We can’t agree to this, but this is interesting.” Now, the people who were the most for this, which were the record

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companies, came back and said, “Forget it, it’s over.” So we actually did that.

And then, when that did not work, we had all kinds of deadlines. They missed every single deadline. Now you have to realize we had congressional staff with us, and they attended the meetings and they listened to the phone conversations.

One of the issues was, “Okay, you don’t want us to write what the issues are and what your positions are, and your deadline is”—they missed that one too.

I do believe that the issues are extremely complex and there is no total universe of identity with these issues. So the record companies’ issues, they say they have solved the problem because they are already licensing. They have now got these new issues with regard to these dual-session discs.⁴⁷

The webcasters and the digital media companies have issues that are probably more closely aligned with the music publishers, and we sent them off to see each other. The music publishers said to us, “That was very interesting. We never knew they were going to do things like that.” We said, “Well, you’ve got to deal with them.”

But their thing is—and I think this is true, and you can comment on this—the longer a company has been in business and has a traditional established model, the harder it is to change.

The other piece that is so difficult is for the music publishers and for the record companies—they are not making money from digital and it is really only a very small portion of their income.⁴⁸ For the digital media companies it is everything, so for them it is life or death. So you are telling these other companies, “You’ve got to work this out,” and they know it is important and they know it is the future, but it is not where their money is coming from now. So I am actually pretty sympathetic.

⁴⁷ See *supra* note 43 and accompanying text explaining dual disc issues.

⁴⁸ See Rafter, *supra* note 44, at 397-98 (noting that “the established record labels contend digital distribution threatens to destroy the music industry by undercutting the profits of all involved and by promoting music piracy.”).

We are waiting to hear from the members of Congress, but I think they are going to ask us to continue to try to work with the parties. All we can do is comment on what they come up with or tell them when we think there is a problem. But it really has to be them who sit down and work out what they think works for them. But it is difficult because there is no money in it right now.

PROF. HANSEN: To what extent are the lack of trust, paranoia, or techno-phobe issues messing this up, as opposed to just the merits of the issue?

MS. PETERS: Lots. I mean it is huge. The music publishers think the record companies call all the shots. The record companies think that the music publishers are off in another world with their heads in the sand. They do not trust each other.

PROF. HANSEN: Are they off in another world with their heads in the sand?

MR. VON LOHMANN: You're on the record.

MS. PETERS: I think that it is harder for the music publishers to move forward, just given their structure. I will leave it at that. I will try to be diplomatic.

PROF. HANSEN: All right.

Joe, you now have the floor.

MR. SALVO: I am going to sort of back up a little bit.

Very quickly, I work as an in-house lawyer for Sony BMG Music Entertainment, which is the new monolith that was created when what used to be Sony Music Entertainment, Inc. merged with Bertelsmann.⁴⁹

In that capacity I do a number of things. I deal with artist agreements on a day-to-day basis, so I am sensitive to artist issues. I myself was actually a recording artist many, many, many years ago, back when dinosaurs roamed the earth. I also get involved in a lot of copyright-related issues, and it is in that context that I am coming to you.

As a disclaimer up front, I should tell you that I tend to be an optimist, so I tend to have a Mary Sunshine view of these things.

⁴⁹ See <http://www.sonybmg.com/> (last visited Apr. 30, 2005).

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MS. PETERS: I'm an optimist, too, you know.

MR. SALVO: And I do ultimately believe there will be a resolution, like Marybeth. I think Marybeth underscored the issue. There are a lot of complicated issues here and it is going to take a while to work through, but I think we are going to work it through.

The music industry is a very exciting place for me to be at this point because it is clearly an industry that is in transition. We have, for years, been a company that has been safely able to rely on manufacturing and distributing widgets, little plastic five inch discs that we stuff in the jewel cases that you cannot open, and then put them on trucks and try to send them to you and sell them to you for fifteen, sixteen, seventeen dollars.

But that world is quickly changing, and it is nowhere more apparent than in my own household, where I have a number of teenage kids. There will always be, in my opinion, a market for fossils like myself to go out into record stores and to hold a product and to buy a CD and to look at the liner notes like I did when I was in college. It is also painfully apparent to me however, that is not necessarily the world in which my children are growing up, in much the same way that they do not go to the library for research projects the way that I did, that they do not rely on the telephone to talk to friends anymore, that they do not rely on the newspapers to get their news or information, that they do not stand on line at concert halls or sports arenas to get tickets for things. Basically you have a generation of people that are coming up that are used to accessing content, information, and getting goods and services through the Internet.⁵⁰ That part is absolutely clear.

And so what I think you are going to see realistically is a change in the paradigm, moving from record companies being primarily companies that manufacture and distribute discs to companies that basically are IP license stores.⁵¹ In fact, that is where we are moving.

⁵⁰ See Lee Rainie & John Horrigan, *A Decade of Adoption: How the Internet has Woven itself into American Life* (Jan. 25, 2005), at http://www.pewinternet.org/PPF/r/148/report_display.asp.

⁵¹ See Lionel S. Sobel, *DRM As An Enabler of Business Models: ISPs as Digital Retailers*, 18 BERKELEY TECH. L.J. 667, 670 (2003) (suggesting a business model where internet service providers act as massive online stores for downloadable media).

As Marybeth alluded to before, in some instances, that is a transition that for people who have grown up all of their life in the physical goods manufacturing and distribution business is a tough transition to make. But making it we are.

It has become painfully clear to anybody who has been watching our industry over the last three to five years that we are taking a hit as a result of what is going on. Music industry sales have been off an average of seven percent for each of the last three years.⁵² This is the first year that we are seeing an up-tick. So far in the year we are up about five percent in terms of number of units.⁵³ So that is a healthful sign. To me that is a hopeful sign.

I think that it does tie into things like the efforts that we have been making in terms of trying to educate people about copyright—like it or not, some of the RIAA suits that have been filed against individual users for example⁵⁴—and ultimately getting a toehold out there in the legitimate digital market.

Marybeth alluded to the Apple story. I think everybody in the recording industry for the most part would again point to that as a good harbinger of things to come. Apple has moved 4 million iPods⁵⁵ and they have recently announced the sale of their 150

⁵² See Recording Industry Association of America [RIAA], *2004 U.S. Manufacturers' Unit Shipments and Value Chart* [hereinafter "2004 Mfr's Chart"], at <http://www.riaa.com/news/marketingdata/facts.asp> (last visited Apr. 30, 2005) (showing CD sales down about 7% per year from 2001-2003); see also *Music's Brighter Future*, THE ECONOMIST, Oct. 18, 2004 (stating "sales of recorded music shrank by a fifth between 1999 and 2003").

⁵³ See Press Release, RIAA, RIAA Issues 2004 Year-End Shipment Numbers, available at <http://www.riaa.com/news/newsletter/032105.asp> (last visited Apr. 30, 2005).

⁵⁴ "[T]he RIAA filed suits against 261 civilians with more than 1,000 music files each on their computers, accusing them of copyright violations. The industry hopes the suits, which seek as much as \$150,000 per violation, will deter computer users from engaging in what the record industry considers illegal file-swapping." Joel Selvin & Neva Chonin, *Artists Blast Record Companies over Lawsuits Against Downloaders*, S. F. CHRON., Sept. 11, 2003, at A4.

⁵⁵ See, e.g., Paul Vaughn, *The Mac Guy: 'Year of the iPod' Has Been Music to Apple Computer's Ears*, SAN ANTONIO EXPRESS NEWS, Dec. 26, 2004, at 21; see also IT Facts, *Music player market shares* (Nov. 7, 2004), at <http://www.itfacts.biz/index.php?id=P1970>. "Apple Computer and HP enjoyed an overwhelming market share in September 2004 music player sales. HP's hard-drive based music player is based on

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millionth legitimate digital download⁵⁶—those are great numbers, and that has all been accomplished in a very short period of time. But by comparison, I believe that Big Champagne, which monitors peer-to-peer use out on the Internet, indicates that at any given time there are probably in the United States alone over seven million people using file-sharing services.⁵⁷ So we have a long way to go.⁵⁸

The historical analogy here is we are in Jamestown. We have set a little colony up down on the Virginia coast that is subject to weather, attacks, and all sorts of things that could happen and could make the settlement fail at any given time. We are nowhere near the frontier where we are expanding out across the United States.

It is a start. It is a good start. I think it is a necessary start.

With that, let me talk a little bit about DRM, the music industry and what is involved.

One other thing I just want to underscore because it will come up in all of these discussions. It is very critical whenever you are talking about music, which is what I am going to talk about, to understand that in any given piece of music there are two copyrights at issue. There is a copyright in the underlying musical work or musical composition, the song, which is typically owned by the writer or the music publisher.⁵⁹ And there is a copyright in

Apple iPod architecture, and two vendors owned a combined 90.9% of the hard drive music player market." *Id.*

⁵⁶ Robert Barba, *Coloradan Gets iTunes' Sales to 150 Million*, DENVER POST, Oct. 15, 2004, at C03.

⁵⁷ See Buzzsonic.com, *RIAA Fire Another Round of Lawsuits at File-Sharers* (Dec. 16, 2004), at <http://musicbiznews24.com/index.php?p=305>.

Latest figures from P2P monitor Big Champagne reveal that in November, the average number of people simultaneously logged on to the P2P file sharing networks at any given moment increased significantly from 6,255,986 in October to 7,452,184. The number of users on P2P networks in the US went up from 4,435,395 in October to 5,445,275 in November.

Id.; see also Jefferson Graham, *Online File Swapping Endures*, U.S.A. TODAY, July 12, 2004, at 1A, available at http://www.usatoday.com/tech/news/2004-07-11-fileswap_x.htm.

⁵⁸ See BBC News, *Efforts to Stop Music Piracy 'Pointless'* (Nov. 22, 2002) at <http://news.bbc.co.uk/1/hi/technology/2502399.stm>.

⁵⁹ See CRAIG JOYCE ET AL., COPYRIGHT LAW § 3.02 (5th ed. 2001).

the sound recording, which is typically owned by the record companies.⁶⁰

In order for any of these digital models to work, you need to get rights in order to exploit both those copyrights in the digital space. Therein lies the problem. If the record companies are willing to license a particular model, but the publishers are not, it is a stalemate—basically nothing can happen.⁶¹ So without the cooperation of both the copyright proprietors of the musical works and the copyright proprietors of the sound recordings, we cannot get anything happening here.

There have been various interim solutions that people have posed. As Marybeth alluded to, in some of our recording contracts, we actually have an incidental license to use musical works in our recordings, and so sometimes we have tried to rely on those control composition clauses or other grants of rights in our recording contracts for the underlying composition in order to help us get both the composition and the sound recording into the digital marketplace. But it is a patchwork quilt of solutions at this point.

With that, let me just talk a little bit about DRM. DRM is really self-help, if you will. Copyright owners under the Copyright Act are given various exclusive rights, including the right to control the distribution and the reproduction of our works.⁶² What DRM essentially is, simply put, is technological self-help in order to control the reproduction and distribution of our works.⁶³

It is a different world, and I am sure Fred will address this. We have had some discussions about it. From time to time there have been great technological upheavals in the history of the copyright industry, including everything from the printing press,⁶⁴ to the first

⁶⁰ *See id.*

⁶¹ One solution would be a blanket license. *See Rafter, supra* note 44, at 408. “A blanket license enables a licensee to pay a periodic fee representing a percentage of the user’s revenues attributable to the performed music.” *Id.*

⁶² 17 U.S.C. § 106 (2002).

⁶³ *See* Renato Iannella, *Digital Rights Management (DRM) Architectures*, D-LIB MAGAZINE, June 2001, at www.dlib.org/dlib/june01/iannella/06iannella.html.

⁶⁴ Diane Leenheer Zimmerman, *It’s an Original!(): In Pursuit of Copyright’s Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 190-95 (2005).

piano roll,⁶⁵ to the first vinyl record.⁶⁶ One way of looking at this is the Internet is yet another new technological change. But I submit to you that it is a very different one.

Again, going back to the time when dinosaurs ruled the earth, if back in my day when I was in college one wanted to share a copy of a sound recording with a friend, one would go out and take one's vinyl LP and queue it up with a cassette and try to get that cassette to replicate the vinyl LP. You would sit there and you would punch the cassette button and the cassette would take the same forty minutes that it took to record the record as the record itself took to play—and at the end of the day, you had a poor-quality copy, analog copy, of the record that you could give to one friend, and it took you forty minutes to do it.⁶⁷

Today it is a very different world. Obviously, any eleven-year-old with ripping software can, with the click of a mouse, basically upload an album into an MP3⁶⁸ file format in moments and can with another click of a mouse make that copy available to millions upon millions of people throughout the world.⁶⁹

So, whereas once upon a time there was a technical or a sort of realistic limit to the way in which copies could be reproduced and distributed that essentially served as a bar to people doing it on a widespread basis unless you were a record pirate, the bottom line is no such bar exists today. Hence, many record companies and other content providers are looking to move to digital rights management, technological measures that basically wrap their files

⁶⁵ David Gorski, *The Future of the Digital Millenium Copyright Act (DMCA) Subpoena Power on the Internet in Light of the Verizon Case*, 24 REV. LITIG. 149, 153-55 (2005).

⁶⁶ *See id.*

⁶⁷ *See Sarah H. McWane, Hollywood vs. Silicon Valley: DeCSS Down, Napster to Go?*, 9 COMMLAW CONSPECTUS 87, 90 (2001).

⁶⁸ *See Rafter, supra* note 44, at 401.

[T]here are several competing formats struggling to become the standard for the digital downloading of music. These formats include a2b, realaudio, liquidaudio and MP3. Of these formats, MP3 is gaining the most popularity among consumers and causing the greatest uproar in traditional music circles. MP3 stands for Motion Picture Experts Group ("MPEG") one layer three, which is a method of compressing audio files into digital format that takes up only one-tenth of the computer memory used by previous technologies.

Id.

⁶⁹ *See McWane, supra* note 67, at 90.

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and give you certain rights in terms of how you can use it—how many times you can reproduce it, where you can reproduce it, whether you can distribute it or not.⁷⁰

I am going to make five quick points in the time I have here.

Basically, when it comes to DRM and the music industry, we are in a very nascent period, and therefore I submit to you that, to paraphrase Samuel Clemens,⁷¹ rumors of the demise of DRM are greatly exaggerated, because we have not really even gotten off the ground.

While it is true that the record companies have imposed digital rights management obligations upon various services, we now, as record companies do, license our content to third-party providers, companies that stream music either on demand or, more often, in compliance with compulsory licensing provisions.⁷² But we do make our music available for streaming.⁷³ We do make it available to services like iTunes where you can download it.⁷⁴ We are making our content available in a great number of places and through a great number of means and vehicles.

Part of the reason we are doing that is that we do not know whether the killer app will arise or what the ultimate consumer endorsement of digital licensing will be. We do not know whether

⁷⁰ *See id.*

⁷¹ Samuel Clemens, an American writer (1835-1910) used the pen name "Mark Twain." From a note written in 1897: "the report of my death was an exaggeration."

⁷² *See* Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 *FORDHAM L. REV.* 2445, 2454-55 (2000).

The public performance right granted by the Digital Performance Right in Sound Recordings Act ("DPRSA") extends to owners of sound recordings when the recordings are digitally performed by either a subscription transmission or a transmission by an interactive service, but not by transmission via a non-subscription broadcast service . . . [W]hether a song is uploaded, downloaded, or streamed in real time, the Web site owner or Internet consumer who offers sound recordings to others must purchase one or more licenses from the sound recording copyright owner or owners to avoid liability for copyright infringement Compulsory licenses are available to non-subscription transmission sites, when the site intends to make the recording available to the general public.

Id.

⁷³ *See Is the Threat of Online Piracy Receding?*, *THE ECONOMIST*, Oct. 30, 2003, available at http://www.economist.com/business/displayStory.cfm?story_id=2177244.

⁷⁴ *See id.*

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a subscription model will rule the day or whether people will want to own and control their content, or whether it will be some combination of all of the above.

So the bottom line is the record companies are trying to license their content wherever we can. But we are trying to do that, as Marybeth alluded to, in a manner that allows us to control and to prevent unauthorized reproduction and distribution ad nauseam, to the point where it undermines our ability to make money. Think what you may about record companies—excesses and all the stories that people read about—but at the end of the day we are an industry that nine out of ten of the releases that we do are not financially profitable for us. We are an industry that basically continues to take the profits that we do make and plough them back into new artists, new music, and new forms of distribution.

From an economic perspective, tying back into Hugh's comment before, this is a very capitalist-driven type of industry, and it is one that needs to continue to generate dollars for the industry if it is going to continue to be able to bring to the fore new music and new manners of distribution.⁷⁵ But we are really at the very beginning stages of this.

The other point that I do want to make—and I am sure Fred will touch on this a little bit—is that piracy and DRM do not exist separate and apart from one another.⁷⁶ The main message I want to impart is that ultimately I think DRM and how DRM shakes out and whether DRM works is all going to be dictated by the marketplace.

I think that Apple has started to establish that. There are many of us in the record industry who think that Apple's rules, in terms of how many times you can share a file and who you can share a file with,⁷⁷ are maybe perhaps further than we might feel

⁷⁵ See Selvin, *supra* note 54. "Recording artists across the board think the music industry should find a way to work with the Internet instead of suing people who have downloaded music They're protecting an archaic industry. . . . They should turn their attention to new models." (internal quotations omitted). *Id.*

⁷⁶ See William Fisher, *Digital Music: Problems and Possibilities*, Section IV(3) (Oct. 10, 2000), at <http://www.law.harvard.edu/faculty/tfisher/Music.html>.

⁷⁷ iTunes allows users to "burn individual songs onto an unlimited number of CDs for your personal use, listen to songs on an unlimited number of iPods and play songs on up

comfortable going, but Apple basically came and in essence dictated to us what those rules were going to be, in part motivated by what was going on in the marketplace.

We did not, as many of you know, do very well in our first endeavors, when the music companies themselves got together and tried to create our own digital music services. There were a lot of, let us say, missteps in terms of what we did.

At first we offered a listen-only service that would allow you to listen to something once for whatever price we were charging you a month.⁷⁸ Then we realized that people did not want to listen to things once, they wanted to listen to it many times, and so we pushed the number of listens that you could do to thirty a month or something. Then ultimately we just gave up and said, "You know what? People want to listen to it as much as they want to listen to it. If they have a subscription, that has got to be part of what the consumer experience is for people to buy into that."

So I think that we have already seen, in terms of the marketplace interfacing with DRM, that the marketplace has a very strong influence on how this stuff works.⁷⁹

But that is inversely tied to piracy. The bottom line is if you have a new teleservice or you are able to download something for free without any restrictions at all on the one hand, and the only legitimate services put so many restrictions on it as to make it stupid, you are in some ways going to drive consumers over to pirated product.⁸⁰ Nobody wants to do that, so we are trying to find the right balance between controlling what people do with it, with the works that they download, and finding a way to manage that relationship.

But it is a very tough battle. Probably the most disturbing statistic I have seen is in one of the Pew Polls that they did in terms

to five Macintosh computers or Windows PCs." See Apple iTunes Home Page, <http://www.apple.com/itunes/store/>, (last visited April 5, 2005).

⁷⁸ See generally Sobel, *supra* note 51 (reviewing the development of the online music industry).

⁷⁹ See Fisher, *supra* note 76.

⁸⁰ See Mike Freeman, *MusicMatch Enters Song-Download Arena*, THE SAN DIEGO UNION-TRIB., Sept. 30, 2003, at C1 (reviewing online music restrictions), available at http://www.signonsandiego.com/news/business/20030930-9999_1b30music.html.

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of pooling people that use P2P services about how they feel about various issues.⁸¹ Basically Pew reported that literally two out of three people polled could care less whether the content that they were downloading or using was copyrighted or not.⁸² Now, we have a long way to go before I think the content industry can feel comfortable trusting the public if two-thirds of the public does not really care whether we have property rights at all on that content.

I am going to stop on that note, let Fred go, and then I am sure we will get into some of the fireworks.

PROF. HANSEN: But before we get to Fred, any questions or specific comments?

QUESTION: Joe Alocca [phonetic], private practice.

Also being from the time of the dinosaurs, when I bought a record and the concern was that only I could play it, is the primary concern here the ease of duplication of the electronic medium and the failure to receive compensation for all those copies,⁸³ or is it that you just do not want copies in the first place, or you could live with it if making copies was more difficult, as in back in the age of the dinosaurs?

MR. SALVO: It is a multifaceted question. The bottom line is we make money by exploiting our copyrights and by selling and distributing copies. You know, the Mary Sunshine part of me takes a look at this and says, "You know, the good news in all of this is while we have lost maybe twenty-one percent of our business,⁸⁴ the bottom line is that more people than ever are

⁸¹ *Pew Internet Project and Comscore Media Metrix Data Memo Re: The State of Music Downloading and File-Sharing Online* (Apr. 2004), at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf.

⁸² *Id.* (noting, that although a March-May 2003 survey indicated that only 27% of music downloaders cared about whether the music the downloaded was copyrighted, a more recent poll, conducted in February 2004, showed 37% cared).

⁸³ See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 267 (2002). "Critics of Napster and other file-sharing technologies fear the power of the Internet to distribute digital information 'virally,' that is, the potential for a single digital copy of a work to be duplicated without limit and spread throughout the Internet." *Id.*

⁸⁴ See International Federation of the Phonographic Industry, *Global Music Sales Fall by 7.6% in 2003 – Some Positive Signs in 2004* (Apr. 7, 2004), at <http://www.ifpi.org/site-content/statistics/worldsales.html>.

enjoying music.” Many of them are doing it in an illegal manner, but the bottom line is, if you talk to any kid on the street today, more kids know more about more acts and more music than at any time in the history of this business. That is a good fact.

We make money as a record company by exploiting our copyrights.⁸⁵ “To exploit” is a very good verb, good parlance, in the copyright industry.

So yes, part of the issue is we would like to have the copies out there and replicated in some ways as often as possible. Part of the problem in the current environment is that—let us take a look at the motion picture business. The record companies in some ways almost shot ourselves in the foot because we have had unencrypted digital content in the marketplace since the 1980’s when we first started introducing the compact disc. The motion picture company has no such problem. The motion picture companies never released their content in unprotected digital format.⁸⁶ When the motion picture companies first started to move to a digital format, DVD, DVDs were encrypted.⁸⁷

We have had to deal with the fact that there is a lot of content that people are used to having in their collections that they are going to want to use. Could the record companies tomorrow, go out and encrypt their product in a way? Absolutely. We could start making CDs that were completely copy-protected but would not play on your CD player. That would make everybody very happy because now you would have to go out and buy your entire CD collection again. The record companies had to deal with balancing the fact that we have an unencrypted digital format that is out there, that is readily replicable and is easily uploadable and distributable if you will, by virtue of the Internet.

⁸⁵ See International Federation of the Phonographic Industry, *Music: One of the Great Global Industries*, at <http://www.ifpi.org/site-content/about/industry.html> (last viewed May 2, 2005).

⁸⁶ See MPAA, *DVD Frequently Asked Questions: What is the DVD Content Scramble System (CSS) and How Does it Work?* at http://www.mpa.org/Press/DVD_FAQ.htm (last visited May 2, 2005).

⁸⁷ See *id.* For a comprehensive explanation of DVD technology and related facts and figures, see DVD Demystified, *DVD Frequently Asked Questions (and Answers)*, at <http://dvddemystified.com/dvdfaq.html> (last modified April 25, 2005).

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I am not sure if I am answering your question. The problem is yes, it is too easy to replicate and distribute without people seeing compensation as a result of that. Yes, we are happy with the replication and distribution; we just want to be in a position to either monetize that and/or control that, have some control over the way that happens.⁸⁸

I think as a copyright owner those are the Section 106 rights that we are granted.⁸⁹ We have the exclusive right to reproduce and to distribute our works and to control the reproduction and distribution of our works.⁹⁰

PROF. HANSEN: Joe, you seem like a nice guy. Why does everyone hate the record companies?⁹¹ If there's any group that has worse PR on the face of the earth, I'm not sure I've found it yet. I think even the Taliban have more fans. So how do you account for that?

MR. SALVO: What can I say? We have a storied history. Memoirs like Walter Yetnikoff's recent book⁹² do not do a great deal to paint a warm and fuzzy picture of who we are and what we do and how we responsibly behave.

Look, the bottom line is the rock 'n roll business is a very different business from investment banking, from insurance, from other types of industries. And yes, we have had our share of excesses, we have had our share of not doing the right things for artists for a painfully long period of time.⁹³ But—and again it

⁸⁸ See Sobel, *supra* note 51 at 670 (discussing utilization of digital technology as a business model).

⁸⁹ 17 U.S.C. § 106 (2002).

⁹⁰ *See id.*

⁹¹ See, e.g., Mark Jorgensen, *Redefine Music to Suit Music Today*, THE MORNING CALL (Allentown, PA), Mar. 1, 2001, at A16; Ceason Ranson, *Money Talk Compact Disc Co's: Does the Music Industry Really Need More Money?*, CHARLESTON GAZETTE, Nov. 21, 1999, at 12E; Robert Trussell, *Haggard Predicts the End of the Record Store*, CHICAGO TRIBUNE, June 11, 1987, at 11F.

⁹² WALTER YETNIKOFF, *HOWLING AT THE MOON THE ODYSSEY OF A MONSTROUS MUSIC MOGUL IN AN AGE OF EXCESS* (Doubleday Broadway Publishing Group 2004).

⁹³ See, e.g., *Ohio Players, Inc. v. Polygram Records, Inc.*, 2000 U.S. Dist. Lexis 157710 (S.D.N.Y. Oct. 25, 2000). Polygram Records signed an agreement with the Ohio Players, a well known funk group from the 1970's, where the Ohio Players received royalties for cassettes and vinyl records, but got no royalties from albums sold on compact disc or when Polygram licensed their songs. See *generally id.* See also *Cafferty v. ScottiBros.*

might just be the Pollyanna part of me—I think it is a great industry. I deliberately got involved in this after having a career in music because I wanted to do it. I believe in the product. I believe in music. Music has been an integral part of my life from the moment I got married, to when my kids were born, to burying my mother—all of that. It has played a part in the fabric of my life. I think it plays a part in the fabric of a lot of people's lives.

I truly believe in the product and I believe, just taking a look at the landscape right now, that what you are seeing is a demand for the product. Whether we have met that demand by making our content available in the digital space in a way that is acceptable to the consumer is up for debate.⁹⁴

But I think we definitely do have some PR issues. I am hopeful that the publishers will surpass us in terms of those PR problems sometime soon and that will enable us all to move forward and look like the good guys for a change.

But we are trying to do the right thing. We are trying to license our content and we are trying to get out there.

PROF. HANSEN: Another question?

QUESTION: Do you guys own a music publisher today?

MR. SALVO: As of August fifth, the answer is no.⁹⁵ We used to own Sony ATV, which is a joint venture that Sony had with Michael Jackson.⁹⁶ That is, fortunately or unfortunately I guess, an asset that we left behind when we did our merger with Bertelsmann. So Sony Corp., the Japanese parent company,

Records, Inc., 969 F.Supp. 193 (S.D.N.Y. 1997). Scotti Records knowingly released various albums with songs written and performed by John Cafferty without his consent and without paying royalty fees. *See generally id.*

⁹⁴ *See, e.g.,* Lewis, *supra* note 21.

⁹⁵ *See* Sony BMG Music Entertainment FAQ, at <http://www.sonybmg.com/> (last visited May 2, 2005); *see also Bertelsmann AG & Sony Corporation Agree On Music Merger*, URB. NETWORK MAG., Dec. 12, 2003, at <http://www.urbannetworkmags.com/SECTIONS/NEWS-ARCHIVE/BertelsmannSonyMerger.html>; *see also* Melissa Eddy, *Bertelsmann and Sony Nail Down Music Merger Deal*, USA TODAY, Dec. 12, 2003, available at http://www.usatoday.com/money/media/2003-12-12-sony-bertelsmann_x.htm.

⁹⁶ *See* Brett Pulley, *Who's the Unfairest of Them All?*, FORBES, Aug. 12, 2002, at 54, available at <http://www.forbes.com/forbes/2002/0812/054.html>.

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continues to own a music publishing company and they own a half-interest in this new joint venture we formed with BMG.

PROF. HANSEN: There is a question up there.

QUESTION: Herman Schwartzman [phonetic], a practicing lawyer. What has happened to the classical music artists, opera, etc.?

MR. SALVO: That to me, as a music lover is one of the more troubling aspects of what is going on in the music business. There is no question that the large multinational record companies tend to market records that are aimed towards the under twenty-five-year-old demographic.⁹⁷

The irony in all that, of course, is whenever you take a look at the Recording Industry Association figures that come out, one of the best buying demographics out there is; guess who guys? Us old guys. We still wander into record stores and buy product.⁹⁸

MS. PETERS: Or go online and buy product.

MR. SALVO: Or go online and buy product.

Unfortunately, I wish I could be more positive. You have a “perfect storm” of things going on in the United States, between the cutting back of music education programs, the fact that there is less public funding for the arts to support the classical musical scene, fewer people able to earn a living as classical musicians, fewer and fewer orchestras, worse economic situations, and a diminishing buying public. And so you have a situation where most of the record companies have their classical division shrinking.⁹⁹

I think the ultimate solution may lie—and I know our classical division will probably want to have my head for this—but I think

⁹⁷ See Chris Riemenschneider, *Marketing Overlooks Older Fans of Music*, J. GAZETTE (Ft. Wayne, IN), May 24, 2004, available at <http://www.fortwayne.com/mld/journalgazette/living/8745774.htm>.

⁹⁸ See RIAA, *Consumer Purchasing Trends: 2003 Consumer Profile*, [hereinafter “Consumer Purchasing Trends”], at <http://www.riaa.com/news/marketingdata/purchasing.asp> (last visited May 2, 2005).

⁹⁹ See Clark Bustard, *Classical Artists Moving To ‘Boutique’ Recording*, RICHMOND TIMES DISPATCH, Feb. 20, 2005, at H2.

the solution may lie in specialty labels, jazz labels like Concord,¹⁰⁰ that have been out there, specialty labels that traffic in classical product. I just do not know that the large companies are doing the kind of job that they need to be doing in that space, to be honest.

PROF. HANSEN: One more question. Five to ten years from now, do you see the record industry radically changed, pretty much doing what it is doing now, or gone?

MR. SALVO: No, I do not see the record industry gone. I think what you are going to see five years from now is a slightly larger mix. What happens is that the mix of the products changes over time. Right now I think something like ninety-seven percent of what we sell is CDs and the remaining two-to-three percent is essentially cassettes.¹⁰¹ If you look at those numbers five years ago, cassettes were maybe ten percent of the market.¹⁰² Basically in another two or three years cassettes will be gone, CDs will be the physical carrier, CDs and DVDs.¹⁰³

I think if you look ahead five years from now, you will see that digital music sales, which are less than one percent at this point of our revenue,¹⁰⁴ or about one percent of the volume that we are moving,¹⁰⁵ will probably be closer to maybe five-seven-ten percent—I do not know what the number will be.

I think ten years from now the picture of the industry will be vastly different because people, like my kids, will be the primary consumers and you will see probably less physical product sales and a much larger portion of the music market represented by

¹⁰⁰ Concord Records, <http://www.concordrecords.com> (last visited May 2, 2005).

¹⁰¹ Mark Brown, *Surprise: Rock Pops Up Again As No. 1 Music Genre*, ROCKY MOUNTAIN NEWS (Denver, Co.), Apr. 24, 2004, at 14D (noting that digital downloads were 1.3 % and cassette tapes accounted for 2.2% of all music sales).

¹⁰² See Consumer Purchasing Trends, *supra* note 98 (observing that in 1999, 8% of sales were cassette tapes).

¹⁰³ See *id.* Cassette sales dropped 39.8% in 2003 from 2002. If the decline continues at this rate cassettes will be obsolete within a few years. *Id.*; see also Jesse Hiestand, *Music Industry Slow Sales Skid in '03*, CHI. SUN-TIMES, Jan. 3, 2004, at 21. Cassette sales dropped 39.8% in 2003 from 2002. If the decline continues at this rate cassettes will be obsolete within a few years. *Id.*

¹⁰⁴ Tim Burt, *Singing a Happy Tune: Why the Music Industry is Upbeat About Online Sales*, FINANCIAL TIMES LONDON, June 30, 2004, at 17.

¹⁰⁵ See 2004 Mfr's Chart, *supra* note 52.

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digital sales, digital downloads, or digital subscription services if that is what ends up being the model.

PROF. HANSEN: Thanks, Joe.

Now we will move on to Fred Von Lohmann, our last speaker. Fred?

MR. VON LOHMANN: I am going to use the podium just because I brought a couple of slides along.

I must say listening to Joe give his talk, I had many conflicting thoughts. First, he has told us that the Axis powers have landed at Jamestown, which I think is troubling. On the other hand, given the fact that my mother is Japanese and my father is German, I can't help but have warm feelings about this event.

[Slide] As many of you know, in international copyright law, there has been a move toward the use of technical protection measures:¹⁰⁶ what is known as TPMs in the international copyright law arena¹⁰⁷ and known more commonly as DRM, digital rights management, in the American market.¹⁰⁸ There has been a shift in international copyright law circles toward viewing TPM or DRM systems as the answer to the digital dilemma.¹⁰⁹

¹⁰⁶ See, e.g., June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 392 (2004) (observing that "many different technological protection methods are already in use, and many others are in development").

¹⁰⁷ See *id.* at 391-2.

Technological protection measures (TPMs) range from the basic to the sophisticated and provide varying degrees of protection against unauthorized access and use of the works. They include such things as password protection, copy protection, encryption, digital watermarking and, increasingly, rights management systems incorporating one or more of the foregoing.

Id.

¹⁰⁸ See *id.* at 451-2.

Digital rights management" or "DRM" . . . commonly refers to a system through which content is made available to users in electronic form online, pursuant to conditions (such as payment, extent of access or copying) established by the content owner. Most DRM systems employ some form of technological controls to prevent unauthorized access to and use of works they contain, although the protection may be as simple as password control.

Id.

¹⁰⁹ See WIPO Copyright Treaty Article II; WIPO Performances and Programs Treaty, Art. 18.

I think you heard some of that from Joe, the hope that these new “digital locks,”¹¹⁰ if you will, will restrain the copying and distribution of these digital bits. The hope is that these locks will give some breathing room or some transitional opportunities to a number of businesses both in the music and movie space to try to manage their transition in an orderly fashion.¹¹¹

I am pleased to see that in the last couple of years both the motion picture industry and the music industry have come to acknowledge that a change and transition is necessary,¹¹² something which was a long time coming, I think.

To turn to the first question of DRM, I want to talk a bit about a paper that is known colloquially as “The Microsoft Darknet Paper.”¹¹³ It was presented by four Microsoft engineers at an academic conference in Washington, D.C., two years ago now.¹¹⁴

I hasten to add that the Microsoft Corporation has been at pains to deny any affiliation with this paper—they maintain that it was just four engineers off on a lark.¹¹⁵ It just so happens they are four of Microsoft’s most senior DRM engineers. They are also, in fact, the people behind the so-called “Palladium” or “Trusted Computing Platform” that Microsoft has been pushing.¹¹⁶

¹¹⁰ See *Digital Media Consumers’ Rights Act of 2003: Hearing on H.R. 107 Before the House Subcomm. on Commerce, Trade, and Consumer Prot., House Energy and Commerce Comm.*, 108th Cong. (2004) (statement of Debra Rose, Entertainment Software Association) (describing digital locks as technological protection measures that “regulate unauthorized access to . . . content.”).

¹¹¹ See *id.* (stating that “[w]ithout [technological protection measures], development and digital distribution of new products becomes an exceedingly risky proposition”).

¹¹² See, e.g., Victoria Shannon, *Online Music Catches On, But Profit Is Hard to Find*, INT’L HERALD TRIB., Jan. 24, 2005 at 9 (reporting that Sony, Samsung, Philips and Panasonic have formed a digital rights management project called Marlin to collaborate on “streamlining” technological protection measures).

¹¹³ Peter Biddle, Paul England, Marcus Peinado & Bryan Willman, *The Darknet and the Future of Content Distribution*, Microsoft Corporation [hereinafter *Darknet*], available at <http://crypto.stanford.edu/DRM2002/darknet5.doc> (last visited May 2, 2005).

¹¹⁴ Patrick Ross, *Employees Write that DRM Systems Is Doomed to Fail*, WASH. INTERNET DAILY, Nov. 25, 2002 at Vol. 3, No. 227.

¹¹⁵ Cf. *id.* (stating that the employees behind the Darknet paper “wrote for themselves and not Microsoft, not surprising since Microsoft has put great effort into backing various DRM technologies.”).

¹¹⁶ See Andy Dornan, *Trusted Computing: A Matter of Trust?*, NETWORK MAG., Jul. 1, 2004, at 26.

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[Slide] There are three assumptions that the Microsoft engineers talk about in talking about DRM.¹¹⁷

First, that DRM will always be broken.¹¹⁸ It will be broken by someone, somewhere. There is no perfect digital lock.¹¹⁹ To this point, every security expert agrees with that assumption.¹²⁰ There has never been a widely publicly distributed DRM system designed for entertainment products that has not been broken.¹²¹ Many of them have actually been broken before they have hit the street.¹²²

Trusted Computing is a form of digital rights management that entails installing security hardware in every personal computer. The most important Trusted Computing tool is the Trusted Platform Module, which guarantees that a computer at either end of a connection may reliably ascertain the identity and configuration of the other computer. In 1999 Intel, Microsoft, IBM, HP and Compaq founded the Trusted Computing Platform Alliance to collaborate on the development of Trusted Computing. In 2003 the Trusted Computing Platform Alliance ceased to exist and handed control over the the Trusted Platform Module to the Trusted Computing Group, the computer industry trade association. Palladium is another Trusted Computing project that Microsoft launched in 2002, which has since been re-named the Next-Generation Secure Computing Base.

Id.; cf. Press Release, Microsoft, Microsoft Discusses Details of Next-Generation Secure Computing Base, available at <http://www.microsoft.com/presspass/features/2003/may03/05-07NGSCB.asp> (May 7, 2003) (describing Peter Biddle as “a product unit manager in the Security Business Unit, the group responsible for building NGSCB [Next-Generation Secure Computing Base, formerly known as Palladium]” and Bryan Willman as “a leading Microsoft Windows architect”); *Cryptography The Open Box*, Microsoft Research Current Research, available at <http://research.microsoft.com/crypto/openbox.asp> (last visited May 2, 2005) (referring to Paul England as a “Microsoft Research cryptographer”).

¹¹⁷ *Darknet*, *supra*, note 113, at 2.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (stating that “no [content protection] system constitutes an impenetrable barrier”).

¹²⁰ See, e.g., *Going Straight*, *ECONOMIST*, Apr. 7, 2001 (quoting the Chief Technology Officer of an Internet security firm, “[w]ith enough effort, he says, any copy protection scheme can be broken—even those embedded in hardware.”).

¹²¹ Cf. *id.* (observing that, to date, technological protection measures have been “no match for hackers.”).

¹²² Cf. Steve Gillmor, Opinion, *Ahead of the Curve: Off the Record*, *INFOWORLD*, Oct. 21, 2002, at 58 (quoting Apple Computers Senior Vice President of Product Marketing Phil Schiller, “Microsoft has more than almost anybody tried to build encryption schemes into DRMs. And as we saw with the last version of Windows Media, it was broken before it shipped.”).

The second assumption is that people will copy things, that people will continue to have that facility.¹²³ Once DRM is broken, it will be very easy to make further copies, something which I think Joe also alluded to.¹²⁴ That is the nature of the technological moment in which we live.

The third assumption is that people will be able to share those copies.¹²⁵ The Microsoft Darknet paper says that people will have high-bandwidth connections to share those copies,¹²⁶ and that is my view as well.

So far, these three assumptions have proven to be pretty well grounded in reality. I want to take these assumptions as a given for a moment and talk a little bit about what it means for DRM systems if they are true.

Some may think that one or more of these assumptions are not true; or, perhaps if they are true today, that somehow they can be made untrue in the future. Let's set that aside for a moment.

Let's ask first: if these assumptions are true, what does it mean for DRM and the future of copyright?

[Slide] Well, first, I think the assumptions mean that DRM is, for mass-market entertainment products, a waste of time. It's what we call the "smart cow" problem. The assumptions basically make it clear that all it takes is one smart cow to lift the latch on the gate and then all the, as we say, less sophisticated cows follow merrily out behind.¹²⁷

That is essentially what the Darknet assumptions make clear. If there is one person anywhere on the planet who has both the motivation and skill to break a DRM system, then once the copy

¹²³ *Darknet*, *supra*, note 113, at 2.

¹²⁴ See *supra* notes 75-77 and accompanying text.

¹²⁵ *Darknet*, *supra*, note 113, at 2.

¹²⁶ *Id.*

¹²⁷ See Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 3, 2003, available at http://www.rollingstone.com/news/story/_/rnd/1111648498596/has-player/true/id/5939600/version/6.0.12.1059 (quoting Steve Jobs the CEO of Apple Computers: "[The Internet is an] amazingly efficient distribution system for stolen property . . . [p]ick one lock—open every door. It only takes one person to pick a lock.").

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has been freed, once the copy has been liberated by that one person, it spreads freely on from that point.¹²⁸

In fact, we have seen exactly this over and over again in the marketplace today.¹²⁹ To take one example, every exclusive track that has been released through the iTunes Music Store, which uses a form of digital rights management to control the copies, has been available on file-sharing networks within two minutes of being released.¹³⁰

Eric Garland, who is the head of Big Champagne,¹³¹ told me that fact. A year ago he was saying it took about two hours. We are down to literally minutes after the file is released on the Music Store, that it finds its way onto the file-sharing networks.¹³²

And, of course, once it is there, it has no rights management restrictions left at all.¹³³ The DRM has been stripped away. So this notion that we can keep honest users honest, that most people will not go to the trouble of downloading the cracking tools necessary, those assumptions no longer hold because everything on the file-sharing networks essentially comes pre-cracked, if you will, pre-circumvented.¹³⁴

The other implication, I think, is in some ways more powerful and more interesting, and one that the Darknet paper originated. It

¹²⁸ See *id.*; see also *supra* text accompanying notes 69-75.

¹²⁹ See, e.g., Mike Godwin, *Content Industry Wants Copyright Cops in PC's*, LEGAL INTELLIGENCER, Jan. 18, 2002, at 4 (noting that “[i]f encryption is broken - and hackers are often able to break it - content is free to be copied.”).

¹³⁰ Cf. *Hear Your Music Anywhere*, at <http://www.hymn-project.org/> (last visited May 2, 2005) (claiming to provide software that “allows you to free your iTunes Music purchases . . . from their DRM restrictions”).

¹³¹ See *About Us*, BigChampagne, at http://www.bigchampagne.com/bc_about.html?PHPSESSID=033bc8aa92eb32bf41113bd016b3209c (last visited May 2, 2005) (stating that “BigChampagne is the leading provider of information about popular entertainment online. Our focus is on the world’s most popular “download” communities, file sharing networks.”).

¹³² Cf. *Hear Your Music Anywhere*, *supra* note 1300.

¹³³ See Godwin, *supra* note 129.

¹³⁴ See Rob Pegoraro, *From the Shareware Industry, Lessons on Keeping Downloaders Honest*, WASH. POST, Mar. 17, 2002, at H07. “How honest are people when they think nobody’s looking? The Internet is a fine place to find out: The near-frictionless ease of sharing files online means that if you want to download something without paying, nobody’s going to stop you.” *Id.*

is the notion that in fact DRM may be counterproductive for the rightholders themselves.¹³⁵

The logic goes something like this: imagine you go to a store, you buy a CD of your favorite band, you bring it home, you find that it is copy-protected, you find that you cannot move those files onto your iPod.¹³⁶ Again, 4 million people today have iPods, not a trivial market.¹³⁷ Apple has been rather coy about letting others interoperate with their file format.¹³⁸

So what happens if you are in that position? Do you return the CD to the store and say, “Well, I suppose I have to go without my favorite band on my iPod?” Many in the music industry have said copy-protected CDs are a success because they see low return rates.¹³⁹

I suggest that is not actually what is happening. I suggest that what you have done is you have just created, if the person who bought the CD was not already a user of KaZaA or eDonkey or any of the other file-sharing networks, you have just created a new user. And having gone to the trouble of installing eDonkey or KaZaA or Morpheus or Grokster or any of the other 130-odd file-sharing applications that are available today, it is going to be very difficult, unless the person is of true moral fiber, to prevent them from saying, “Oh, you know, there is more stuff out here than just

¹³⁵ See *Darknet*, *supra* note 113 at 15 (positing that “increased security (e.g. stronger DRM systems) may act as a *disincentive* to legal commerce.”).

¹³⁶ See *id.* (asserting that “a securely DRM-wrapped song is strictly *less* attractive” because it restricts what customers can do with the song).

¹³⁷ *But cf.* Scott Morrison, *Labels Demand a Bite as Apple Calls the Tune: Digital Music: Recording Companies Want to Raise Wholesale Prices Amid Fears That Steve Job’s Giant Has Become Too Dominant*, FIN. TIMES, Mar. 4, 2005, at 11 (putting the number of Apple iPod music players on the market as ten million as of early 2005).

¹³⁸ See *Chiariglione Pushes For a Moral Digital Media Framework*, DIGITAL MEDIA EUR., July 28, 2004 (referring to the incompatibility “between iTunes and non-iPod-based handheld media players. For now at least, consumers can’t download iTunes tracks to any media players except iPods.”).

¹³⁹ *But see* Lewis, *supra* note 21 (relating how consumer advocates predicted a backlash against record companies that sell copy protected CD’s after a consumer won a suit against a record company when her copy-protected CD did not permit her to copy songs to a portable MP3 player).

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the CD I bought, and maybe I'll want to download some of that too."¹⁴⁰

So, the insight the Darknet paper made is that DRM actually may hurt you as a rightsholder, that, if you are competing in a Darknet world—a world where people can get everything you put out essentially for free in a Darknet channel—the last thing you want to do is put up a restriction or barrier that motivates them to essentially seek out that channel.¹⁴¹

[Slide] So, a couple of stories about DRM in the field today and how the Darknet story works out.

Some have said, “Well, the Microsoft engineers must be wrong because DVD has been such a success.¹⁴² Isn't DVD a story of how the Darknet actually isn't harming the basic mindset behind the DRM view?”¹⁴³ Well, I actually think that is not the case. I think if you look closely at DVDs, it tells a very different story.

I ask you: What is shoring up the DVD market? As all of you know, DVDs have been fantastically successful, continue to be fantastically successful, the quickest uptake of a new format in consumer electronics history, millions of DVDs being sold, basically markets that no one even knew existed appearing out of nowhere.¹⁴⁴ The movie studios, for example, have been shocked

¹⁴⁰ Cf. David McGuire and Eric Garland, *Transcript*, Internet Piracy: Recording Industry Lawsuits (Jan. 22, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A36356-2004Jan21.html> (reporting that there are approximately 60 million file sharers in the United States and estimates that there are 100 million file sharers world-wide).

¹⁴¹ See *Darknet*, *supra* note 113 at 15. “In short, if you are competing with the darknet, you must compete on the darknet's own terms: that is convenience and low cost rather than additional security.” *Id.*

¹⁴² See John Horn, *DVD Sales Figures Turn Every Film Into a Mystery*, http://news.yahoo.com/news?tmpl=story&u=/latimests/20050417/ts_latimes/dvdsalesfigu resturne-veryfilmintoamystery (last visited May 5, 2005) (observing that domestic DVD sales in 2004 reached \$15.5 billion); John Seabrook, *The Money Note; Can the Record Business Survive?*, *NEW YORKER*, Jul. 7, 2003, (noting that “the movie industry has yet to see its profits eroded by illegal downloading”).

¹⁴³ See Seabrook, *supra* note 1422. (observing that “[u]nlike the music industry, the film industry is incorporating copy protection into its digital recordings”).

¹⁴⁴ See *Notebook*, *CONSUMER ELEC.*, Jan. 25, 1999 (reporting that “DVD. . .is [the] most successful new format introduction in [the] chain's history”).

and amazed at how many people seem to want to buy old television serials that they had basically given up on.¹⁴⁵

So what is protecting that market? Is it the encryption? The encryption, as some of you may know, called CSS, was cracked almost immediately after the demand arose by a group of teenagers in Europe, Jon Johansen being only the most famous of that group.¹⁴⁶ And frankly, DVDs now—I beg to differ with Joe when he says the motion picture studios are in a better position because they encrypted their content—DVDs today are widely cracked, decrypted, for all kinds of reasons.¹⁴⁷

But the notion that it is hard, that frankly doesn't bear empirical scrutiny. 321 Studios, for example, sold a piece of software that made it easy to make copies of DVDs.¹⁴⁸ They sold over a million copies of that software in Best Buy and Circuit City and places like it.¹⁴⁹ Now, they were shut down by the courts, but only after a million copies were sold.¹⁵⁰

¹⁴⁵ Thomas K. Arnold, *TV Winners: Series Are Serious Business* (Oct. 14, 2004), The Hollywood Reporter.com, at http://www.hollywoodreporter.com/thr/television/feature_display.jsp?vnu_content_id=1000672278 (Thomas Lesinski, President of Worldwide Home Entertainment at Paramount Pictures said, "The demand for classic TV shows on DVD has grown dramatically. The difference from two years ago is that the number of classic TV shows has surpassed the number of new shows being released on DVD, and they are selling better than anybody could have predicted back then.").

¹⁴⁶ See Paul Rubell, *Pop-Up Ads, Domain Names Give Way to Legal Rulings*, N.Y. L.J., Oct. 28, 2003, at 16 ("[T]he movie industry's legal efforts to stop the publication of its trade secret, the CSS code that prevents the copying of DVDs. A 15-year-old Norwegian boy, Jon Johansen, broke the CSS code, by creating a mathematic algorithm called DeCSS. DeCSS allows copy-protected DVDs to be copied.").

¹⁴⁷ See Research Paper, *Copyright and Digital Media in a Post-Napster World*, Gartner G2 and The Berkman Center for Internet & Society at Harvard Law School, available at <http://cyber.law.harvard.edu/home/uploads/254/2003-05.pdf> (Aug. 2003) (stating that "[d]istributing films over the Internet is increasingly easier" and estimating that "more than 350,000 movies are downloaded off the Internet daily.").

¹⁴⁸ See *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1089 (N.D. Cal. 2004) (stating that 321 Studios "markets and sells software and instructions for copying DVDs.").

¹⁴⁹ See Thomas M. Morrow, *Movie Studios Prevail Over 321; Two Courts Issued Injunctions Against Maker of DVD-Copying Software*, NAT'L L.J., May 10, 2004, at S1 (noting that 321 Studios sold more than one million copies of its software in the United States).

¹⁵⁰ *Paramount Pictures Corp. v. 321 Studios*, No. 03-CV-8970, 2004 U.S. Dist. LEXIS 3306 (S.D.N.Y. Mar. 3, 2004) (enjoining 321 Studios manufacturing, importing, or trafficking in any decoding software); *321 Studios v. MGM Studios, Inc.*, 307 F. Supp.

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In the wake of 321 Studios, today you can get free software on the Internet from hundreds of locations.¹⁵¹ DVD Shrink is probably the most common and widely known for Windows.¹⁵² There are versions for Macintosh that allow you to do this for free.¹⁵³ In fact, most people seem to agree that the free version is even better than what 321 Studios was willing to sell you for \$80.¹⁵⁴

So it is not the encryption that is protecting the DVD market. It is, I submit, the same thing that has always protected copyright markets: a great product at a great price. DVDs today you can buy often for less than \$10 a title.¹⁵⁵ The last DVD set I bought, “The Lord of the Rings” boxed set included four DVDs for \$23.

And more importantly perhaps, you do not need to buy the DVD at all. You can rent the DVD for as little as \$2 or \$3.¹⁵⁶

And if, like me, you are a NetFlix subscriber,¹⁵⁷ essentially the marginal cost of watching a DVD is zero. I just add it to my

2d 1085, (N.D. Cal. 2004) (enjoining 321 Studios from manufacturing, distributing, or otherwise trafficking in any type of DVD circumvention software).

¹⁵¹ See, e.g., SmartRipper v2.41, at http://www.afterdawn.com/software/video_software/dvd_rippers/smartripper.cfm (last modified Mar. 5, 2005) (providing free software that decrypts DVD's); but see, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (enjoining software vendors from posting the DeCSS software which decrypts the CSS (Content Scramble System) on a website as a violation of the DMCA).

¹⁵² See, e.g., Jim Rossman, *Prolong Life of Kids' Movies by Burning Copies of Them*, DALLAS MORNING NEWS, Feb. 26, 2005, at 3D (“The free program DVD Shrink is a popular solution to rip the movies to your hard drive and compress them to fit on a one-sided DVD . . . [y]ou can download DVD Shrink at www.dvdshrink.org.”).

¹⁵³ See, e.g., *id.* (counseling readers that, “Macintosh users can use a program such as Mac the Ripper for the same purpose.”).

¹⁵⁴ See Dave Wilson, *Whose DVD? A Debate Over Copies*, N.Y. TIMES, Jul. 8, 2004, at G6 (asserting that “[w]hile the film industry has forced 321 Studios . . . to stop selling software that can copy Hollywood movies sold on DVD's . . . [p]urveyors of software tools that can do the same thing, sometimes better, are flourishing on the Internet—and the wares are often free.”).

¹⁵⁵ See, e.g., Stephanie Schorow, *DVD 'Starter Sets' Reel in Buyers*, BOSTON HERALD, Mar. 18, 2005, at O28 (reporting that 20th Century Fox Home Entertainment is selling DVD's that contain between two and four episodes of television shows for less than \$10).

¹⁵⁶ See, e.g., David Pogue, *In the Competition for DVD Rentals by Mail, Two Empires Strike Back*, N.Y. TIMES, Mar. 31, 2005, at C1 (reporting that a subscription to Blockbuster's service offering DVD rentals by mail costs \$15 per month for an unlimited number of rentals).

¹⁵⁷ See, e.g., *id.* (reporting that Netflix invented the DVD rental by mail service).

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queue,¹⁵⁸ it comes in the mail. Of course, I pay \$17.99 a month, but I don't really feel that cost; it's part of the monthly media bullet that I absorb every month.

So frankly, I think that is what is protecting DVDs. It is certainly not the encryption. In fact, I have asked many movie studios, "Release your next blockbuster without CSS and see if anyone even notices."

I have already mentioned the iTunes story, the fact that the DRM there is certainly not protecting any files.¹⁵⁹ I find it especially ridiculous because you have DRM on files, on songs in the iTunes Music Store, that are simultaneously being sold by the millions in record stores with no encryption or restriction whatsoever.¹⁶⁰ So the notion that you should punish the w/DRM customers who came to you in the digital environment to pay you money—ninety-nine cents for that download¹⁶¹—the fact that you would do anything that would drive them out of your legitimate service and into the peer-to-peer networks strikes me as somewhat self-defeating.

So the question is: are rightsholders foolish? Do they just not understand that DRM doesn't work? No. In fact, I think they understand very well.

There is up-side on the DRM issue, but it is not about controlling copying or distribution, as many would have you believe. It's about something very different. It's about controlling technology.

So the DVD is a great example. DVD encryption doesn't work, yet have they given it up? No. Why not? Because in order to make a device capable of playing DVDs you have to get a

¹⁵⁸ See, e.g., *id.* (describing the Netflix "queue" as "a list of the movies you want to see, in the order you want to see them").

¹⁵⁹ See *supra*, notes 128-132 and accompanying text (discussing how tracks released through the iTunes Music Store are momentarily available on file-sharing networks).

¹⁶⁰ See, Charles Arthur, *Record Firms Push New Anti-Piracy Disks*, INDEP., Mar. 20, 2002, at 5 (noting that because the "CD has no encryption system . . . [s]ongs on CD's can be 'ripped' off and turned into millions of compressed, unprotected MP3 versions that are swapped over the internet daily").

¹⁶¹ See *supra* note 77.

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license now from a group, a cartel, called DVD CCA.¹⁶² DVD CCA in that license will tell you exactly what features you are allowed to offer and what features you are not allowed to offer.¹⁶³

That is very new. Sony did not have to think about this when they built the first VCR. They did not have to worry about having the feature set dictated to them.¹⁶⁴ With DVDs they do have that.¹⁶⁵

Let me say a little more about that. We have seen a bitter dispute arise between Apple and RealNetworks.¹⁶⁶ RealNetworks would like to sell songs through its Music Store that people can play on their Apple iPods.¹⁶⁷ Of course, Apple suddenly is not so terribly interested in enabling that and is saying, "Our digital rights management format is ours alone and no one else is allowed to

¹⁶² See DVD Copy Control Association, *Frequently Asked Questions (FAQ)*, at <http://www.dvdcca.org/faq.html> (last visited May 3, 2005).

[t]he DVD Copy Control Association (DVD CCA) is a not-for-profit corporation with responsibility for licensing CSS (Content Scramble System) to manufacturers of DVD hardware, discs and related products. Licensees include the owners and manufacturers of the content of DVD discs; creators of encryption engines, hardware and software decrypters; and manufacturers of DVD Players and DVD-ROM drives.

Id.

¹⁶³ See, e.g., Stephen A. Booth, *DVD Server Maker is Sued for Alleged Breach of DVD's CSS License*, CONSUMER ELEC. DAILY, Dec. 9, 2004 (reporting that DVD CCA has filed suit against DVD server maker Kaleidescape for breaching its CSS license by "permitting permanent copies of DVDs to be stored on the hard drives of its home networked servers," while Kaleidescape claims that it obeyed the "technical and procedural specifications" of its CSS license and has filed a counter-suit against DVD CCA).

¹⁶⁴ See James Lardner, *Fast Forward: Hollywood, The Japanese, and the VCR Wars*, 21-36 (1987).

¹⁶⁵ See, e.g., Booth, *supra* note 1633.

¹⁶⁶ See Eriq Gardner, *Getting to the Core of Apple's Dispute with RealNetworks; Questions for Former Patent Czar Bruce Lehman*, 14 IP LAW AND BUS. 11 (2004) (presenting a legal analysis of the dispute between Apple and Realnetworks by Bruce Lehman, former commissioner of the Patent and Trademark Office and current head of the International Intellectual Property Institute, who posits that, by figuring out how to play the music files it sells through Rhapsody, its Internet music store, on the Apple iPod, Realnetworks does not violate the DMCA because it fits into the DMCA's reverse engineering exception.).

¹⁶⁷ *A Digital Divide*, Editorial, N.Y. TIMES, Aug. 26, 2004, at 26 (explaining how Realnetworks has created a software program called Harmony that permits its music to play on an iPod: "RealNetworks mimics Apple's software without licensing it.").

interoperate.” In effect they are using DRM not to protect the interests of rightsholders but to promote platform lock-in among its customer base and ensure that people who own iPods are mated to the Music Store and vice versa. This strategy pays dividends to Apple in a world where it is the minority platform holder and is trying to sell iPods.¹⁶⁸

So I submit that DRM is very useful to many people in the marketplace, but not for what you have been told it is good for.

[Slide] I want to say just one brief thing about licensing, because that is the other piece of our discussion here.

I actually am entirely on Marybeth’s side on this.¹⁶⁹ I think licensing is the answer.¹⁷⁰ I think DRM is not the answer.¹⁷¹ I

¹⁶⁸ See John T. Mitchell, Symposium, *DRM: The Good, The Bad and The Ugly* (2004), Center for Intellectual Property in the Digital Environment, University of Maryland, University College, available at http://www.interactionlaw.com/documentos/DRM_good_bad_ugly.pdf.

In some instances . . . [the] purpose of using DRM technology to make a work inaccessible for private performances is to eliminate competition from the lawful secondary markets involving redistribution of the work. . . when the purpose and effect of a given DRM is to eliminate lawful competition, the practice should be condemned *per se*. (emphasis in original)

Id.; cf. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 549 (2004) (observing that Congress wanted to make sure that the use of interoperable devices by consumers would be protected by the DMCA).

¹⁶⁹ See *supra* text accompanying note 23.

¹⁷⁰ See Fred von Lohmann, *More and More Observers are Coming to the Same Conclusion—the Music Industry Needs to Give up its Dreams of Controlling Distribution in Favor of Collecting Fair Compensation*, 4 IP LAW AND BUS. 12 (2004).

The music industry forms one or more collecting societies, which in turn would offer file-sharing music fans the opportunity to “get legit” in exchange for a reasonable regular payment . . . per month. . . . In exchange, file-sharing music fans who pay . . . will be free to download whatever they like, using whatever software works best for them. The more people share, the more money goes to rights-holders. The more competition in file-sharing software, the more rapid the innovation and improvement.

Id.; Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, “Let the Music Play” White Paper, http://www EFF.org/share/collective_lic_wp.pdf (Feb. 2004) [hereinafter *EFF White Paper*] (proposing voluntary collective licensing as the solution to copyright infringement through file-sharing).

¹⁷¹ See von Lohmann, *supra* note 170 (stating that “[w]hile the authorized music services are attracting a modest number of customers, they together account for a trivial percentage of the total number of digital music files being downloaded today.”).

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don't think DRM really has a meaningful place in the digital future so long as a Darknet exists.¹⁷²

I think licensing, however, is the digital future. I think voluntary collective licensing has proven itself in the music space.¹⁷³ In particular in the radio context, ASCAP, BMI, and SESAC have built a system, a voluntary system—not a system of statutory rates, not a system of the government telling you what to do. Granted, there is antitrust oversight and there are restrictions.¹⁷⁴ But overall it is a system that has worked very well. It is a system that allows radio stations to play whatever they want, whenever they want, however many times they like, on whatever equipment they like, so long as they pay a reasonable fee.¹⁷⁵

I think that is the future for the digital music space as well, rather than bickering about this statutory license for on-demand webcasting, and this and that and the other.

¹⁷² See *id.* (noting that “some estimates put the number of American music swappers at 60 million . . . [and] the number of U.S. file-sharers continues to grow. The global file-sharing population is skyrocketing.”).

¹⁷³ See Jordana Boag, Comment, *The Battle of Piracy versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act (DMCA) As Its Weapon Against Internet Users' Privacy Rights*, 41 CAL. W. L. REV. 241, 267 (2004). When radio stations first started playing copyrighted songs, they faced a similar situation to what P2P sites face today; the radio station solution was voluntary collective licensing. *Id.* The basic premise of voluntary collective listening is that copyright holders “voluntarily join together and offer ‘blanket’ licenses.” *Id.* To solve the radio issue, a “performing rights organization (PRO) was formed, songwriters and music publishers were invited to join, and blanket licenses were given to any and all radio stations that wanted them.” *Id.* In return for the fee collected by the PROs, radio stations were legally allowed to use the copyrighted music without having to request specific permission each time. *Id.* The PROs were then given the task of dividing the revenue generated by these licensing agreements amongst the participating members. *Id.* Something similar could be organized for file-sharing networks where the “major labels could get together and offer fair, non-discriminatory license terms for their music.” *Id.*

¹⁷⁴ See von Lohmann, *supra* note 170 (stating that “[v]oluntarily creating collecting societies like ASCAP, BMI, and SESAC was how songwriters brought broadcast radio in from the copyright cold in the first half of the twentieth century”).

¹⁷⁵ See *Hearing on Copyright Protection on the Internet Before the House Subcomm. on Courts and Intellectual Property*, 104th Cong. (1996) [hereinafter *Internet Hearing*] (statement of Frances W. Preston, President and CEO, Broadcast Music, Inc.) (stating that “[u]nder present law . . . , a work is publicly performed if it is transmitted electronically over-the-air by a network to a local broadcasting station or a cable system . . . Through collective rights organizations—BMI, ASCAP and SESAC - songwriters receive royalties for these performances.”).

I think eventually we will end up in a situation where you as an end-user will be entitled to download whatever music you like, in whatever format you can find it and from whomever out there happens to have it. You can have as many copies from as many artists as you feel you can listen to, in exchange for paying a reasonable fee—\$5 a month, \$10 a month, whatever it might be. This system will not be about DRM, not about restricting your ability to use the media;¹⁷⁶ but rather enabling and taking advantage of the three Darknet assumptions.¹⁷⁷

[Slide] Again, if people want to think we can change one of those three, I'm happy to talk about it. But until then, I think licensing, particularly voluntary collective licensing, may be the best way out.

PROF. HANSEN: Thank you.

Before we go into our general discussion period, any specific questions to Fred?

MS. PETERS: I have a question. How do we get to voluntary collective licensing?

MR. VON LOHMANN: In the wake of your experience with the negotiations, it does seem an unenviable task.¹⁷⁸

I personally think we get there the same way we have gotten where we have gotten so far, which is continuing pressure on the existing stakeholders in the form of a marketplace that is otherwise going to walk away from them.¹⁷⁹ It seems to me quite plain—and everyone I have spoken to in the music industry agrees—that but for peer-to-peer filing sharing, we would never have seen an Apple

¹⁷⁶ See *Hearing on Peer-to-Peer Networks Before the Competition, Foreign Commerce and Infrastructure Subcomm., the Senate Commerce, Science and Transportation Comm.*, 109th Cong. (2004) [hereinafter *P2P Hearings*] (statement of Michael Weiss, CEO, Streamcast Networks, Inc.) (positing that under a system of voluntary collective licensing agencies “music labels and other copyright holders could receive significant royalty revenue based upon the degree to which their copyrighted material is determined to have been distributed each year, and individual artists and songwriters . . . might share in a significant royalty pool”—a system “not dissimilar from existing collective licensing societies like ASCAP, BMI, and SESAC.”).

¹⁷⁷ See *supra* text accompanying notes 118-126.

¹⁷⁸ See *supra* text accompanying notes 42-43.

¹⁷⁹ See generally von Lohmann, *supra* note 170.

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iTunes Music Store.¹⁸⁰ It would never have happened. It would never have happened on those terms, it would never have come into existence in this timeframe.

I think as well that voluntary collective licensing will be a painful realization and something that will be fought until the music industry admits that nothing else is working. And I do think we are on the path toward a “nothing else is working” result.

MR. SALVO: I think in response to that, the music companies entered into the digital space clearly before the publishers did and we were in that space well before Apple iTunes. We just did not do a great job in terms of our first offerings, and basically the marketplace ended up speaking. The marketplace said, “Look, guys, what you’re trying to offer to the public in terms of what you are charging for what you are offering—people are not interested.”

We sunk tens of millions of dollars into the first two systems that were set up, PressPlay and MusicNet.¹⁸¹ MusicNet was an amalgam of BMG, EMI, and—let’s see, Sony Universal was PressPlay. Who am I forgetting?

MS. PETERS: Warner.

MR. SALVO: Warner. Thank you.

But it was a misstep. Copyright owners have the right to make mistakes, and we have done it before, we’re going to do it again, I have no doubt about that.

But I think that Fred is absolutely right, there would not have been an Apple without the pressure of the peer-to-peer networks. The fact that our offerings failed as abysmally as they did I think

¹⁸⁰ Cf. Phil Hardy, *Falling Sales in Q4 Mean that the US Soundcarrier Market Ended 2004 with Only 1.6% Unit Growth*, MUSIC & COPYRIGHT, Mar. 2, 2005 (noting that “the major record companies are increasingly seeking to support and legitimate P2P networks that will charge subscriptions or fees to file-sharers.”).

¹⁸¹ See Adam Lashinsky, *Saving Face at Sony*, FORTUNE, Feb. 21, 2005, at 79 (reporting that “[i]n 2001 [Sony] launched a joint venture with Universal Music Group called Pressplay that initially failed to license music from competing labels and as a result never attracted many users” and was eventually abandoned); Mark Fox, *E-commerce Business Models for the Music Industry*, POPULAR MUSIC AND SOC’Y, Jun. 1, 2004, at 201 (noting that “MusicNet was launched by AOL Time Warner, BMG Entertainment, EMI, and RealNetworks, an Internet technology firm . . . [and] [t]his service, like Pressplay [sic], will allow users to either download or stream music.”).

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ultimately drove us to, probably first reluctantly but ultimately embracing our starting to license our content to these services. I think that is a good thing.

And I think you are starting to see a bit of a mind change in terms of the upper executive suits in terms of how they are looking at this, and people are starting to look at this as new markets, ancillary uses, additional income.

I think the fear that people have is the replacement issue—and, frankly, it's what drove the 1995 Digital Performing Rights Act¹⁸² and it's what drove the DMCA¹⁸³—the idea that, “Oh my God, if you can access anything at any time under any circumstances, why would people go out and pay money for that?”

I think Fred alluded to the answer in some of what he was saying about DVD.¹⁸⁴ I think ultimately we will be able to compete with free products. Part of what we have to do is educate. Saying that DRM is useless until such time as these precepts disappear is like saying that we don't need locks on houses until crime disappears. I mean the bottom line is I believe you need to have some sort of protection for the copyrighted works in this sort of Wild West kind of environment that exists right now.

But I think that it is incumbent upon us if we are going to compete in this marketplace to come up with value-added features—hence, the interest in the record companies in moving to a dual-disc product that has audio-visual content on it, interviews, other types of value-added type experiences, in the same way that DVD has additional value-added experiences to the movie.¹⁸⁵

And hopefully, the marketplace will dictate all of that. All of what Fred's comments were about, in my opinion, was that we are making some stupid choices, but they are our choices to make. If

¹⁸² Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

¹⁸³ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. § 1201 (2000)).

¹⁸⁴ See generally *supra* text accompanying notes 142-147.

¹⁸⁵ See, e.g., Greg Thom, *DVD's New Order*, HERALD SUN (Durham, NC), Dec. 5, 2001, at C32 (touting the DVD's “value-added features,” including, “play options, . . . chapter selection and special effects . . . games and directors' commentaries.”).

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we are stupid enough to exercise them in an unfruitful way, then we will pay the price of that, as we have already to some extent.

But I don't think it is an argument for changing the copyright laws to eliminating exclusive rights. It is a very strong business argument for us getting our act together.

MR. VON LOHMANN: I just want to touch on a couple of things.

First, the market is still running away from the authorized music services, make no mistake.¹⁸⁶ Apple has a great PR machine¹⁸⁷—150 million downloads sounds great,¹⁸⁸ until you count up the fact that Norah Jones by herself in two albums has sold more titles than the Apple Music Store has since its creation.¹⁸⁹

MR. SALVO: Jamestown.

MR. VON LOHMANN: Well yes, barely. I still submit the market is moving away from you. I agree learning is taking place. I am hoping the learning proceeds at a more rapid clip.

But to answer your second issue, everyone already can get everything they want that you sell for free, and yet you continue to sell. In fact, this year you sold more CDs—or at least shipped more CDs—than you did last year.¹⁹⁰ So clearly the replacement

¹⁸⁶ See von Lohmann *supra*, note 170 (arguing that although “Apple’s iTunes Music Store has sold more than 300 million songs in two years, . . . its success pales next to the number of files being traded on swap services. According to BigChampagne, the number is over 1 billion songs a month.”).

¹⁸⁷ See John Naughton, *Great Ideas in Small Packages*, OBSERVER (UK), Jan. 16, 2005, at 3 (describing the “enactment of a venerable twice-yearly ritual - the unveiling of new Apple products . . . it seemed to follow the time-honoured pattern: weeks of fevered pre-release speculation (some of it no doubt seeded by Apple’s inventive PR machine)”).

¹⁸⁸ See Scott Morrison, *Labels Demand a Bite as Apple Calls the Tune*, FIN. TIMES, Mar. 4, 2005, at 11 (reporting that Apple has sold more than 300 million songs through its online store).

¹⁸⁹ See Eric Nicoli, Letter to the Editor, *Music Industry and its Stars Still Have Much to Offer*, FIN. TIMES, Oct. 22, 2004, at 16 (maintaining that Norah Jones has sold 28 million albums in two and a half years).

¹⁹⁰ See David Browne, *Who Needs Albums?; Forget Rubber Soul and Tommy. Downloads and iTunes Have Killed the Classic Album, and That May Not Be Such a Bad Thing*, ENT. WKLY., Jan. 14, 2005, at 29 (reporting that “[d]espite the rise of downloading, CD sales have inched up: In 2004, about 2 percent more discs were sold than during the previous year.”).

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fear—the story is quite a bit more complex than perhaps the anxiety would suggest.

MR. SALVO: Yes.

MR. VON LOHMANN: So I think there is room there.

That being said, I think that you should be entitled to monetize the file sharing. I think that is fair and proper and right. I am not nearly so sanguine about the notion that you should *control* that distribution mechanism, just as the music publishers, frankly, gave up control in exchange for compensation when the compulsory license was put into place, and to some extent they gave up further control when the collective license of BMI, ASCAP, and SESAC arrived to monetize radio.¹⁹¹

I think there is a future there. I think it is a future that may lead to smaller record companies, fewer actual humans behind desks, but I think it will lead to more profitable record companies.

And I agree with you completely that in ten years' time, you will see record labels being much more about licensing intellectual property, just like the music publishers are today and have been for the last century, than about shipping physical product.

Much of what you said reminded me of where the music publishers were at the turn of the 20th century. They were in the business of shipping sheet music. And lo and behold, some ten or fifteen years after that, they found that they were out of that business and yet were still doing very well. In fact, thanks to the efforts of the record labels, they turned out to do spectacularly better than they could otherwise have hoped.

So I do think DRM is actually a bad idea. I think it's not like a lock on the door—it's more like a situation where suddenly all the

¹⁹¹ See Rafter, *supra* note 44, at 408.

In order to perform musical compositions publicly, web site owners can obtain blanket performance licenses from the three main music performance rights societies American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music Incorporated ("BMI"), or SESAC, just as radio stations and music venues commonly do. A blanket license enables a licensee to pay a periodic fee representing a percentage of the user's revenues attributable to the performed music.

Id.

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burglars had the ability to walk through walls at will. Suddenly perhaps the locks start looking like the wrong place to be focusing your efforts. I'm not saying there aren't other places to focus, but not the locks.

PROF. HANSEN: Thank you, Fred. We have some comments here. I think we should move to the open discussion period.

QUESTION: My name is Raymond Dowd. I'm an attorney in New York and I do a fair amount of copyright litigation.

To focus on a clarification of Fred's comments, your comments seemed to indicate that you had concerns about copyright owners also owning platforms for delivery. Would that be an accurate characterization?

MR. VON LOHMANN: No, not so much that.

QUESTIONER: What do you advocate?

MR. VON LOHMANN: I actually think that copyright owners tried that trick. PressPlay and MusicNet I think can be viewed as a play for a platform position.¹⁹² I think they are out of that business, having learned their lessons quite well.¹⁹³

What I think you are seeing is copyright owners essentially being shanghaied into an existing platform war that has characterized the information technology space for many years.¹⁹⁴

So you see, for example, competing standards—RealNetworks has theirs, Microsoft has theirs and Apple has theirs.¹⁹⁵ Each of

¹⁹² See *supra* text accompanying note 181.

¹⁹³ See *id.*

¹⁹⁴ See *Digital Music, Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. (2005) (statement of Raymond Gifford, President, The Progress & Freedom Foundation).

[M]arkets for digital music are nascent and emerging. Different platforms, different file formats and different digital rights management systems are competing for dominance. Indeed, even different business models are duking it out, with Napster To Go's subscription model taking on iTunes and Wal Mart's . . . pay-per-song model.

Id.

¹⁹⁵ Benny Evangelista, *Music Sites To Get More Competition*, S. F. CHRON., Dec. 15, 2003 at E1.

The record industry is struggling to combat a three-year decline in CD sales, which it blames largely on file-sharing networks like Kazaa, which are not licensed by the record labels. But the music industry has high hopes for a small

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them wants to manipulate it to lock in their customer base to the exclusion of others.¹⁹⁶

The way I see it, copyright owners and rights holders should, I think, be pretty horrified at that. It is basically going to mean that their success is being stymied in part by the desires of these tech companies.¹⁹⁷

MS. PETERS: That was my interoperability issue.¹⁹⁸

MR. VON LOHMANN: I completely agree. I would love to see more interoperability. But we have already completely interoperable music formats today.¹⁹⁹ When RealNetworks launched their so-called “Music Choice” campaign,²⁰⁰ I said,

but growing band of online music services licensed by the record labels to sell streamed or downloadable songs. Among those services are Apple Computer’s iTunes, Roxio’s Napster 2.0 and RealNetworks’ Rhapsody, but major companies including Wal-Mart, Sony, Hewlett-Packard, Amazon.com and even Microsoft are also poised to enter the online music market.

Id.

¹⁹⁶ See Alan Cohen, *Diving In*, 22 IP LAW AND BUS. 2, Feb. 25, 2005, at Vol. 22, No. 2. While there are emerging standards [in] digital rights management, there is also a lot of proprietary technology already in use. Since DRM is implemented in software, not hardware, a whole host of different solutions could coexist on the same PC. Microsoft uses one form of DRM in its software products; Apple uses another for its iTunes Music Store. DRM customers simply want an effective way to lock up content, so it’s irrelevant to them if different types of DRM systems are incompatible. Indeed, many companies, notably Apple, have been actively opposed to any kind of interoperability. It’s better for business if a song downloaded from iTunes can play only on an iPod. So while the big DRM vendors are pushing for standards, they’re also pushing their own proprietary solutions.

Id.

¹⁹⁷ See *Music’s Brighter Future-The Music Industry*, *supra* note 52 at 2 (claiming that “[t]oo many restrictions on the paid-for [music download] services may entrench file-sharing.”).

¹⁹⁸ See *supra* text accompanying notes 16-20.

¹⁹⁹ See Johnathon Zittrain, *Cyberspace and Privacy: A New Legal Paradigm? What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 201 (1999) (noting that “[t]hanks to MP3 compression and the software built around it, a single person can obtain a music CD, “rip” its tracks onto her hard drive, and then “burn” them onto a new blank CD [and] email them to friends . . .”); see, e.g., Steve Levine, *Downloading Music: A Beginner’s Guide*, DLY. TEL. (UK), Oct. 21, 2004, at 21 (giving instructions on how to transfer music between formats).

²⁰⁰ *Freedom of Choice*, at <http://www.musicfreedomofchoice.org/> (last visited May 4, 2005); see Adelia Cellini, *Apple and RealNetworks Face Off Over the iPod: Music Battle*

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“Well, if you really cared about your customers’ choice, you would advocate that they just take the downloads, burn them to a CD, and then rip them to either MP3 or AAC or any of the half-a-dozen open and widely supported formats.”²⁰¹

PROF. HANSEN: Should they just give up?

MR. VON LOHMANN: Well, it’s already on the file-sharing networks anyway.²⁰²

QUESTION: For Marybeth, the issues that we’re seeing facing the music industry—you mentioned e-books, photography, literature, art.²⁰³ Are we going to see other industries hit by the digital revolution in the same way that the music industry has been hit?

MS. PETERS: They will be hit. Music is the hardest, and it is because of what we talked about, that there are two copyrights, there is the music publisher’s and then there is the sound recording.²⁰⁴ It is also that with regard to music, the performing rights are administered by performing rights organizations and the recording and distribution right is by another organization.²⁰⁵ So

Gets Real; Mac Beat, MACWORLD, Nov. 1, 2004, at 14 (“Both Real[networks] and Apple are fighting to cloak themselves in the language of protecting consumers. But in reality, both of them are actively working hard to restrict consumer choices,” says Fred von Lohmann, an attorney with the Electronic Frontier Foundation industry group.”).

²⁰¹ See Cellini, *supra* note 200.

‘It has nothing to do with consumer freedom,’ von Lohmann says. ‘If these companies cared about that, they would be recommending that consumers burn all the music they buy to CD and then re-rip those tracks into unrestricted formats like MP3, which works on all the portable digital-music players on the market.’

Id.

²⁰² See *Music’s Brighter Future-The Music Industry*, *supra* note 52 at 2 (reporting that there were 800 million music files “freely available online” in June 2004); see, e.g., von Lohmann, *supra* note 170 (reporting that 5 billion unauthorized music files are traded on the Kazaa network every month).

²⁰³ See *supra* text accompanying notes 21-22.

²⁰⁴ See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.01 (66th ed. 2005) (stating that “separate rights and protections are accorded to . . . (1) the musical composition . . . [i.e.] the lyrics and the music . . . [and] (2) the physical embodiment of a particular performance of the musical composition . . .”).

²⁰⁵ See Corey Field, *New Uses And New Percentages: Music Contracts, Royalties, And Distribution Models In The Digital Millennium*, 7 UCLA ENT. L. REV. 289, 290-1 (2000).

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you've got all of these organizations that have to be part of the playing scene that I think makes it very, very complicated.

Movies are easy—there's one place you go.²⁰⁶ Software—one place you go.²⁰⁷ When it's music in a phono record, you've got many places to go.

PROF. HANSEN: Okay. Name and affiliation, please.

QUESTION: I am Julie Fenster. I'm an IP licensing lawyer, I guess, for lack of a better description.

[T]he separate rights in the “bundle of rights” of copyright ownership have traditionally marched in step with separate business functions and licensing organizations within the music industry. For example, the 106(1) right to reproduce copies or phonorecords; the 106(2) right to prepare derivative works, and the 106(3) right to distribute copies or phonorecords correspond to most of the activities of the print music industry, the recording industry, and the licensing organization The Harry Fox Agency Inc. (Harry Fox) which administers licenses on behalf of copyright holders and collects the resultant “mechanical royalties” from record companies. Similarly, the 106(4) right of public performance corresponds to the activities of performing rights organizations such as the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Inc. (BMI), and SESAC Inc., which license live, radio, television, and other performances on behalf of copyright owners.

Id.

²⁰⁶ See NIMMER, *supra* note 204, at §23.01 (stating that “. . . the production company financing the work obtains the copyright in the results and proceeds of these myriad “work for hire” services, retains the copyright in the entire picture and all its constituent elements, and is deemed the “author” of the work for U.S. copyright purposes.”).

²⁰⁷ See *Krause v. Titleserv, Inc.*, 402 F.3d 119, 124 (2d. Cir. 2005)

[C]ourts should inquire into whether the party exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy for purposes of § 117(a). The presence or absence of formal title may of course be a factor in this inquiry, but the absence of formal title may be outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights over it to be sensibly considered its owner.

Id.; NIMMER at § 27.02.

[W]ho owns the copyright to the software and who will own it once the software is up and running [depends on the circumstances]. Sophisticated computer programs are typically the result of the work of many different contributors, who may or may not retain the copyright in their respective work. These contributors may be regular employees, in which case the employer typically owns the copyright in the employee's work, or they may be independent contractors.

Id.

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I am just wondering, in DRM, what happens to what I consider to be the hallmark and the wonderful thing about U.S. copyright law, which is fair use.²⁰⁸ How do you ever get the right to use something? How do you ever get to the material—forget the right—practically, technologically, how do you ever get to the material to be able to use this thing called fair use?

MS. PETERS: Well, the good news is that at the moment you know that content is not locked up.

MR. VON LOHMANN: It's a non-issue.

MS. PETERS: So for them it's a non-issue.²⁰⁹

²⁰⁸ See 17 USCS § 107 (2000).

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

²⁰⁹ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001).

[T]he DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred. Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the 'fair use' of information just because that information was obtained in a manner made illegal by the DMCA.

Id.; 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004).

[A] simple reading of the [DMCA] makes it clear that its prohibition applies to the manufacturing, trafficking in and making of devices that would circumvent encryption technology, not to the users of such technology. It is the technology itself at issue, not the uses to which the copyrighted material may be put.”); Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyperlinking to Infringing Content*, 87 IOWA L. REV. 829, 835 (2001) (stating that “because the specific factors used in fair use analysis evolved in the context of direct infringement suits, they are ill-suited for considering the behavior of parties who do not themselves make use of copyrighted material.

It has come up with regard to the DVD.²¹⁰ And we certainly look at it with regard to access controls²¹¹ and exemptions.²¹²

Fair use basically says you have to be able to access the material to make use of it.²¹³ In the *Corley* case, they made it clear that that's not necessarily in the most desirable format.²¹⁴ So it doesn't mean that you can break a lock in order to go in to get the digital file that has been encrypted, but it does mean that it has got to be available somewhere for you to make use of it.²¹⁵

When we were actually looking at DVDs, the Motion Picture Association came in with a camcorder and they showed how you can actually use a camcorder, and they actually made the copy from the screen. For most purposes, certainly noncommercial purposes, the copy was good enough.

Now, if it is going to be for commercial purposes, you're going to have to license it anyway.²¹⁶ So it really has to be that you've got to get access to the content.²¹⁷

²¹⁰ See, e.g., *Corley*, 273 F.3d at 459.

[T]he DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.

Id.

²¹¹ See 17 U.S.C. 1201 (a)(1)(A) (2000).

²¹² See 17 U.S.C. 1201 (a)(1)(C), (d)-(j); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 393 (2004) (stating that "[t]he law includes various exemptions, each with its own requirements. While the exemptions excuse the act of circumventing technological access controls, most permit only very limited distribution of circumvention devices and some permit none at all.").

²¹³ See 17 USCS § 107.

²¹⁴ See *Corley*, 273 F.3d at 459 (holding that "[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").

²¹⁵ See Besek, *supra* note 2122 at 393 (stating that "... the DMCA is concerned with the act of passing the barrier of the "locked" program and not with the copyright infringement that might occur once the protected material has been accessed.").

²¹⁶ See 17 U.S.C. § 107(1); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (holding that use of a copyrighted work for commercial purposes is a factor that may weigh against a finding of fair use).

PROF. HANSEN: Thank you.

MR. VON LOHMANN: I, of course, have a very different view. I limited my remarks here today about why I think DRM is bad from the rights holder's own perspective. From the view of the collateral damage that DRM imposes on the rest of us, I have a whole other presentation, in fact a whole white paper on EFF's website detailing all of the horror stories we have seen.²¹⁸

Fair use is certainly imperiled in a world where DRM can essentially impose whatever restrictions a rights holder may like through access controls.²¹⁹

DVD is, in my view, a problem on that front. Let's take one simple example. Say I have a DVD that I own, that I want to watch on the plane on my trip from Oakland to JFK, and I'd rather not have it in my DVD drive, where frankly the battery on this machine won't make it through a two-hour film. Why should I not be allowed to rip that movie to my hard drive, watch it on the plane? I bought it. It's my copy. It's exactly the kind of space-shifting one would imagine in the analog world. It is suddenly, at least if you believe *Corley* and the other cases, a per se violation of the DMCA.²²⁰ That's one easy example. There are dozens of others.

²¹⁷ See Besek, *supra* note 2122 (asserting that the anti-circumvention provisions in the DMCA apply to breaking through technological protection measures, not what is done with the content once it is accessed).

²¹⁸ EFF, *Unintended consequences: Five Years Under the DMCA*, http://www.eff.org/IP/DMCA/unintended_consequences.php.

²¹⁹ See Besek, *supra* note 212. "With respect to provisions that protect works against unauthorized access, critics argue that (1) they . . . create a new copyright right without the exemptions and limitations that attach to the other rights, and (2) the exemptions in the statute are inadequate." *Id.*; Jeff Sharp, *Coming Soon to PayPer-View: How the Digital Millennium Copyright Act Enables Digital Content Owners to Circumvent Educational Fair Use*, 40 AM. BUS. L.J. 1, 33-34 (2002). ("[T]he DCMA's anti-circumvention provisions upset the balance required by our system of copyright laws by crowding out fair use. . ."); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 524 (1999) (asserting that there are "far more legitimate reasons to circumvent a technical protection system than the DMCA's act-of-circumvention provision expressly recognizes.").

²²⁰ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) (holding that the DMCA prohibition of software that circumvents DVD encryption does not unconstitutionally limit fair use); *accord* 321 Studios v. MGM Studios, Inc., 307 F. Supp.

With regard to software we have a real problem today, on the issue of interoperability. In fact, using DRM to block interoperability and reverse-engineering is something that has always been protected as a fair use, ever since the *Sega v. Accolade*²²¹ and the *Sony v. Connectix* cases.²²² We are litigating a case right now in St. Louis where this comes up, where the software vendor basically doesn't permit any access, including for reverse-engineering, and once you start doing it, they claim a DMCA violation.²²³

So fair use is imperiled by DRM. That is a cost, and especially in light of the lack of benefit, probably not merited.

PROF. HANSEN: Thank you, Fred.

Since I have been incredibly nice so far, there are some answers to Fred.

First of all, I think most of this set forth as fair use is really not fair use.

Second, transaction costs in the analog world of getting fair use were much more than they are now. Everything is more readily available now. If you had to get a book, you had to go to the library, you had to borrow it from your friend. All of those are

2d 1085 (N.D. Cal. 2004); *see also* *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1133 (N.D. Cal. 2002) (holding that the DMCA does not “substantially impair” fair use rights).

²²¹ *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) (holding that “based on the policies underlying the Copyright Act that disassembly of copyrighted object code is, as a matter of law, a fair use of the copyrighted work if such disassembly provides the only means of access to those elements of the code that are not protected by copyright and the copier has a legitimate reason for seeking such access.”).

²²² *Sony Computer Ent., Inc., v. Connectix Corp.*, 203 F.3d 596, 598-99, 602-610 (9th Cir. 2000) (holding that the use of reverse engineering to make copies of Sony's Playstation software to figure out how the software functioned was protected fair use).

²²³ *See Blizzard v. BNETD*, at http://www.eff.org/IP/Emulation/Blizzard_v_bnetd/ (last visited May 4, 2005).

At issue in this case is whether three software programmers who created the BnetD game server—which interoperates with Blizzard video games online—were in violation of the Digital Millennium Copyright Act (DMCA) and Blizzard Games' end user license agreement (EULA). . . EFF will argue that programming and distributing BnetD is a fair use and therefore violates neither Blizzard's EULA nor the DMCA's prohibitions.

Id.

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transaction costs. You had to travel to various libraries to quote things and everything else. You have everything at your fingertips.

The possibility of fair use now in a DRM world, digital world, is so much easier that it's absolutely incredible. What many people talk about as fair use in the analog world was simply uses that were allowed because they were relatively few and the transaction costs of enforcement were too high.

I also reject the idea that you can't readily access works or information on the Internet today. The Internet is almost copyright-free, with no one even trying to enforce rights against end users. Certainly, the end-users on the Internet don't care about copyright protection. Another myth is that end users care about fair use. It's people who want to use the work in a way that incorporates it into another work that want and need fair use. The people are better able to do make use of other works today than they could in the hard copy and analog world for a number of reasons.

As to Fred's comments about what the music publishers have done with radio and voluntary licensing, it was never voluntary licensing. The broadcasters thought they could play music for nothing and it was in the copyright owner's interest that people would hear it. Restaurants were furious at the idea that they had to pay for performing rights. Nobody voluntarily came along, and the law up until a point appeared to be on the broadcasters' side.

It was Justice Brandeis' opinion, who was no friend of intellectual property, in *Buck v. Jewell-Lasalle Realty*²²⁴ that created the multiple performance doctrine. This allowed ASCAP, and later BMI, on behalf of composers and music publishers to demand licenses from broadcasters and restaurants, etc. who used recordings to play music for customers—the collecting societies also and venues who provided live or recorded music for

²²⁴ 283 U.S. 191 (1931) (holding that using public speakers to play copyrighted musical compositions throughout a hotel that were received from a radio broadcast was a "performance" under the Copyright Act).

customers.²²⁵ They were able to change the entire culture of what you could do with a copyrighted work.

To say that you can't do that in the digital world—I think is wrong for a number of reasons. One is, if you sue people individually, end-users, whether they are eight years old or grandmothers or whatever they are, and if you do it enough, ultimately you have the same effect that you had with ASCAP going after people with lawsuits.²²⁶ And ASCAP was uncompromising with no apologies when it went after venues for licenses. It received criticism, much like that of the RIAA and its end user suits, but it was effective.²²⁷

So ultimately, people, even if they think they should be allowed to do it, they will not do it if there are strong enough disincentives. And this applies to public whether it be littering or downloading. And enforcement of the law might cause some people to think that what they are doing might just be wrong.

And that wouldn't be a bad thing with regard to downloading. Just because you can copy doesn't mean you should be able to copy. The ability to do something does not make it right.

²²⁵ See NIMMER *supra* note 204 at § 8.18 (A) (“Under certain circumstances a single rendition of a work may give rise to more than one performance under the Copyright Act.”); Stephanie Haun, *Musical Works Performance and the Internet: A Discordance of Old and New Copyright Rules*, 6 RICH. J.L. & TECH. 3 (1999). “The multiple performance doctrine emerged so that a subsequent transmission of a musical work, even by a person apparently receiving the work on a receiver, and playing or further transmitting the work in public, was a potentially-infringing performance.” *Id.*

²²⁶ See, e.g., Maralee Buttery, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 COLUM. L. REV. 1245, 1262 n.88 (1983) (describing the history of ASCAP's blanket licensing litigation).

²²⁷ See Haun, *supra* note 225.

Music users' resentment and distrust of the performance rights societies is further exacerbated by the societies' enforcement practices. Both, ASCAP and BMI send undercover representatives into establishments using publicly-performed music who listen and make notations of songs that they believe to be within the societies' repertory. If the performer and/or establishment does not have a license, the societies will often send a letter, or series of letters, claiming copyright infringement and offering to sell a license. If there is no response, or a negative response is forthcoming, the societies may begin litigation to enforce the copyright, sometimes without informing the alleged infringer of any available alternatives, under either the consent decrees, or the Copyright Act.

Id.

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Technology can be used for bad ends as well as good ones. It does not make all ends good

So I am all for technology, but why shouldn't copyright owners also benefit from technology? The idea that the benefits and the efficiencies only belong to users is just another method attacking copyright protection but without the necessity of saying why there should not be copyright protection on a principled basis.²²⁸

So I don't think the future is completely as hopeless as some would have us believe. What we need is enforcement, education and a legal method to get the digital product easily.

Fred indicates that regardless of what the law says, people will still download and copy.²²⁹ Well, extra legal efforts can be used by both sides, some legal some maybe not.²³⁰ We don't want to push copyright owners to take actions the equivalent of cyber vigilantes. Moreover, if an industry's existence is seriously threatened, it will look to make legal that which in less threatening times would be illegal.²³¹

²²⁸ See, e.g., Severine Dusollier, *Open Source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J.L. & ARTS 281, 282 (2003) (discussing "copyleft," an anti-copyright movement among artists).

²²⁹ See *supra* text accompanying notes 131-134; *Music's Brighter Future-The Music Industry*, *supra* note 52 (commenting on file-sharing culture).

²³⁰ See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 27 n.105, 32 n.122, 33-34 (2004) (noting that, in an attempt to stop illegal peer-to-peer file sharing, some copyright owners have engaged in technological self help measures, "spoofing" files by flooding peer-to-peer networks with files that do not contain what their name would indicate); Daniel W. Kopko, *Looking for a Crack to Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA*, 8 COMP. L. REV. & TECH. J. 83, 87 (2003) (observing that "[i]nternet piracy opponents have also begun to put out fake sound files in order to try to discourage downloads.").

²³¹ See Litman, *supra* note 230 at 32 n.122 (stating that the RIAA "sought legislation that would have immunized copyright owners from suit or criminal prosecution for damage caused by 'disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network . . .'" (citation omitted) The legislation proved controversial and failed to make it out of the Judiciary Committee."); Kopko *supra*, note 230 (noting that the RIAA has lobbied hard for legislation that would allow content owners to hack into users' computers to disrupt file sharing."); Cohen, *supra* note 196 (discussing various digital rights management strategies used to combat copying).

I have taken a lot of time and Fred wants to respond, and should be able to do so, but we need to go to questions first.

QUESTION: Hi. My name is Rick Pardo. I'm here as a guest of my son Jonathan who is a student here.

I kind of bring a unique perspective to this. I was a financial executive, with Polygram as its corporate controller, Polygram Record Group as its director of financial services, and later on I went with the enemy at Boardwalk Entertainment where I was its vice president of finance and director of licensing. Through those ten years I was also a representative of all of those entities to the RIAA anti-piracy group.

I find it ironic that the things that were discussed thirty and twenty years ago, respectively, are still being discussed today, albeit with other mediums. What do I mean by that?

As a representative of Polygram, my other record company colleagues were aghast at the fact that one of my parent companies brought out and was constantly improving the fidelity of blank cassette tapes. By the way, the industry outcry at that point was to encrypt blank tapes and license those for resale as well.

And then they got crazy altogether when people like Pioneer, Sony, and Panasonic were bringing out cassette decks that were capable of master quality tapes and wanted to do the same thing with encryption as well as licensing those things.

These are just random observations of an old industry warhorse.

I would say to you, John, that with respect to why the record companies are not doing as well today as they did in the 1970s and 1980s, I would submit two things to you. First of all, you don't have a complement of artists today like you did then—Stones, Beach Boys, Elton John, etc. These artists who were not only great and capable, but also contractually obligated to bringing out two albums a year, which generated buzz and sell-through and all sorts of push/pull economic things in the marketplace.²³²

²³² *Music's Brighter Future-The Music Industry*, *supra* note 52 at 2.

[M]usic bosses agree that the majors have a creative problem. Alain Levy, chairman and chief executive of EMI Music, told *Billboard* magazine this year

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Number two, they are not doing well because when you guys, as you said, were late to the party with your own file-sharing networks,²³³ the marketplace had already dictated through Napster, Grokster, Morpheus, etc., what the salable—or in this case non-salable—distribution channel was going to be, and it wasn't going to be you.

MR. SALVO: If I can just respond, at least to the first point, as much as I grew up with the Stones and those bands, the Doors, everybody else, and those are bands that I still listen to, I do take issue. I think that some of the music coming out today is every bit as good as the music that was coming out back then. With all due respect, there is some aspect of the next generation of music never being as “good” as your generation’s music. But I think that, given the prevalence of file sharing that is going on and the amount of music that is out there, I think there are some absolutely terrific artists that are out there.

The other comment that I want to make in terms of profitability is—yes, we were profitable a number of years ago. For example, I remember reading about the first instance in which one of the record companies broke ranks and finally decided to pay royalties to artists. For a long period of time, as you know, artists were compensated by being paid union scale for going in and performing, and there was this whole notion of why would you ever pay an artist a royalty on a back-end sale. You know, we are in a world where it costs us over \$1-to-\$1.5 million to bring a new artist to market at this point between the recording costs and the marketing costs, and that wasn't really the cost of doing business

that too many recent acts have been one-hit wonders and that the industry is not developing durable artists. The days of watching a band develop slowly over time with live performances are over, says Tom Calderone, executive vice-president of music and talent for MTV, Viacom’s music channel. Even Wall Street analysts are questioning quality. If CD sales have shrunk, one reason could be that people are less excited by the industry’s product. A poll by *Rolling Stone* magazine found that fans, at least, believe that relatively few “great” albums have been produced recently.

Id.

²³³ See *supra* text accompanying note 181.

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twenty years ago.²³⁴ So there are a lot more financial pressures on us.

Yes, we still do a lot of stupid things, we have a lot of waste and a lot of excess, but the bottom line is that it's harder to make that nut when your costs have gone up as astronomically as they have. This has become big business for many of the artists as well.

PROF. HANSEN: Another question.

QUESTION: Hi, I am Judy Bass. I'm a media and entertainment lawyer in private practice.

I wonder, in terms of this vision of voluntary collective licensing,²³⁵ maybe if somebody could fill that out a little bit more about in terms of taming this Wild West. Are we talking about putting some sort of charges on the sale of computers, on the hardware? Are we talking about [inaudible] the Grokster's of the world? Has anybody done any models about how to actually practically go about doing this?

I do believe—I have a teen-age daughter too—that some kids do care. At least if it's easy, if it's something that you don't see, if it's like a cable fee or your Internet ISP kind of charge—I mean you will pay for it in some way. So is there a model out there?

MR. VON LOHMANN: There actually are several models that lots of different people have proposed.²³⁶ At EFF we have one that we like.²³⁷ It is closer to the ASCAP-BMI voluntary licensing model.²³⁸

²³⁴ See Greg Kot, V. Dion Haynes, Joshua Klein, *You Say You Want a Revolution; A New Artists' Coalition Puts the Record Industry's Billion-dollar Business Model at the Crossroads: Shrink or Perish*, CHI. TRIB., Feb. 24, 2002, at C1 (estimating the costs to a major label of marketing a new artist at \$250,000 to \$2 million per album).

²³⁵ See von Lohmann, *supra* note 170 and accompanying text (putting forth voluntary collective licensing as the solution to digital music copyright issues).

²³⁶ See, e.g., *P2P Hearings*, *supra* note 176 (positing a model of voluntary collective licensing agencies where copyright owners receive royalties based on the amount of distribution of their copyrighted works over the Internet).

²³⁷ *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, "Let the Music Play" White Paper, http://www.eff.org/share/collective_lic_wp.pdf (Feb. 2004) [hereinafter *EFF White Paper*].

²³⁸ See *Internet Hearing*, *supra* note 175 (explaining how songwriters receive royalties through BMI and ASCAP for radio broadcasts of their copyrighted works); Boag, *supra* note 173 (explaining how voluntary collective licensing for radio has worked how it

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I think one of the keys is you need to, one way or another, license the end-user.²³⁹ The days of licensing the intermediary I think are rapidly waning.²⁴⁰

That's not to say that the intermediaries can't serve as a very valuable collection point—I think they can. But as an intellectual property lawyer, I think the license has to flow all the way down to the end-user, because the end-user is the one that is going to be making the copies and distributing the copies.

So how do we collect the money from the end-user? Different solutions have been suggested.

Some have suggested levying at the ISP level.²⁴¹ After all, the nice thing about ISPs is that nobody gets Internet access unless they are going through an ISP somewhere. And those ISPs are all American companies, they're all onshore. I don't know anybody who gets their ISP access from Mexico or anyplace else. So it has that benefit as a collection point.

I think the software vendors can be collection points as well.²⁴²

Again, the key here is you have to create some kind of win/win for your intermediary. So imagine for example if Verizon could advertise a package that says “for this package you can download all the music you want for free”—of course “for free” meaning after you pay us our package price—“from any source you like, and it will be legal, and you don't have to worry about being sued

could work for the Internet); *id.* at 2 (describing how ASCAP and BMI evolved to collect royalties for songwriters from radio stations and how the same thing could work for file-sharing).

²³⁹ See Boag, *supra* note 173.

Starting with just the 60 million Americans who have been using file-sharing software, \$5 a month would net over \$3 billion of pure profit annually to the music industry—no CDs to ship, no online retailers to cut in on the deal, no payola to radio conglomerates, no percentage to KaZaA or anyone else.

Id.

²⁴⁰ *Cf. id.*

²⁴¹ See, e.g., *EFF White Paper*, *supra* note 2377 at 2. “ISPs could bundle the fee into their price of their broadband services for customers who are interested in downloading.”

Id.

²⁴² See *id.* “P2P file-sharing software vendors could bundle the fee into a subscription model for their software . . .” *Id.*

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or any of that.”²⁴³ I think that product, if they could advertise it, would appeal to lots of people, particularly the parents of many teen-agers I know, as well as universities.²⁴⁴ Numbers of people would sign up for that.

I imagine software companies could see the value in that advertising possibility as well.²⁴⁵

So I think you do need to find as many potential collection points as you can.²⁴⁶ I don’t think there is going to be one magic bullet answer.²⁴⁷

Professor William Fisher of Harvard just published a book, called *Promises to Keep*, that discusses a view of his.²⁴⁸ He is more along the compulsory licensing side than EFF is.²⁴⁹

There are a number of academics who are beginning to talk about models and what might work.²⁵⁰

²⁴³ *See id.* “ISPs would love to be able to advertise a broadband package that includes ‘downloads of all the music you want.’” *Id.*

²⁴⁴ *See id.* “Universities could make it part of the cost of providing network services to students.” *Id.*

²⁴⁵ *See id.* at 3. “So long as the individual fans are licensed, technology companies can stop worrying about the impossible maze of licensing and instead focus on providing fans with the most attractive products and services in a competitive marketplace.” *Id.*

²⁴⁶ *See id.* at 5 (suggesting ISPs, universities, and software vendors as potential collection points).

²⁴⁷ *File-Sharing: It’s Music to Our Ears*, at <http://www.eff.org/share/compensation.php> (last visited May 4, 2005) (discussing various file-sharing schemes that would compensate artists and copyright owners, including voluntary collective licensing, individual compulsory licenses, ad revenue sharing, online tipping, microrefunds, bandwidth levies, and media tariffs).

²⁴⁸ WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* (2004).

²⁴⁹ *See id.*

²⁵⁰ *See, e.g.*, Jessica Litman, *Sharing and Stealing*, 27 *HASTINGS COMM. & ENT. L.J.* 1, 33-34 (2004) (discussing models proposed by various academics that would permit peer-to-peer sharing, while compensating artists and copyright owners); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 300–304 (2004) (proposing temporary measures to compensate copyright owners until file-to-file sharing is replaced by licensed music streaming); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *HARV. J.L. & TECH.* 1, 3 (2003) (proposing a model that allows “unrestricted noncommercial P2P file sharing in return for imposing a levy on P2P-related services and products.”); Lionel S. Sobel, *DRM as Enabler of Business Models: ISPs as Digital Retailers*, 18 *BERKELEY TECH. L.J.* 667, 668 (2003) (proposing a model where “ISPs would license digital works from their copyright owners at wholesale

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MR. SALVO: I just want to add one postscript to that part of your question. I'm not a big fan of blank tape levies. I don't think that they have worked here in the States. If you take a look at what is going on in Europe, some very disturbing information has come out of Germany, which has a private copying right and fixes a levy on blank media and has probably one of the worst piracy rates in all of the Western world, and the German record industry is even more in the toilet than the U.S. market is at this point.²⁵¹ So I am very leery of a blank tape levy or blank recording medium levy or recording device levy.

PROF. HANSEN: Okay. We have a question over here.

QUESTION: Hi. My name is Jonathan Pardo. I'm a student here at Fordham and I work in the entertainment department at Greenberg Traurig in New York.

I disagree. There is plenty of good music today. This young man over here still thinks that "Solid Gold" comes on every night at 7:00 o'clock.

Two quick things. We see Apple iTunes Music Store, where Apple claims—and it is probably for the most part true—that they make almost no money off the downloads, that where they make their money is by using the music as a loss leader²⁵² to sell Apple iPods. This is similar to Best Buy and Wal-Mart, where they use

prices set by the owners . . . [and] . . . then sell the digital works to their subscribers at retail prices set by the ISPs."); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 270 (2002) (proposing a model that "would fund the creation of music through taxation of computer and other electronic equipment and services that facilitate the copying of digital music, with those funds disbursed to artists based upon aggregate Internet use."); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 910 (2001) (suggesting the possibility of a "limited tax on copying technology and blank storage media").

²⁵¹ Ryan James, *Computer Software And Copyright Law: The Growth Of Intellectual Property Rights In Germany*, 15 DICK. J. INT'L L. 565, 581–2 (1997) (discussing software piracy in Germany and the measures taken by the German government to combat the problem).

²⁵² See *Loss Leader Strategy*, <http://www.investopedia.com/terms/l/lossleader.asp> (last visited May 4, 2005) (defining loss leader strategy as "[t]he strategy of offering a product or service at a considerable discount and loss of profit in order to attract future business").

CDs as loss leaders to bring people into the store to sell the microwaves and other appliances.

Do you ever see a point in the future where the music industry morphs into basically one big loss leader for people that sell blank CDs, which Sony sells, or CD burner drives, or computers for that matter that people will buy as applications to burn music?

In addition to that, real quickly, what are your feelings on the paper that came out of Harvard by Felix Oberholzer-Gee that basically said that downloads had a negligible impact on record sales going down, and that in fact a lot of that had to do with the pop music bubble bursting, the economy kind of going south, and people who had upgraded their collections from records to CDs finally being done with that?²⁵³

MR. SALVO: In terms of the loss leader issue, that is a concern. In fact, you're absolutely right. Steve Jobs' interest in iTunes is largely driven by the profit that he sees on the sale of the iPods themselves.²⁵⁴

One of the reasons that you see the copyright industries trying to control the issue so much is because one of the things that we don't want to see happen is that music becomes marginalized in the way that you're alluding to. It doesn't help our industry. It doesn't help in terms of regeneration. We ought not to become a loss leader. That's part of the problem, frankly, with what some of what Fred is suggesting in terms of turning this entire issue over to people who do not care for the health and well-being of the industry as a whole.

We will continue to try to do things that enhance the value of music, that continue to draw people back to legitimate services and

²⁵³ See Daniel Gross, *Does a Free Download Equal a Lost Sale?*, N.Y. TIMES, Nov. 21, 2004, at 4 (discussing a study performed by Professor Felix Oberholzer-Gee, an associate professor of business administration at Harvard Business School, and Professor Koleman S. Strumpf of the University of North Carolina at Chapel Hill, which examined the correlation between popular downloads and popular CDs in the fall of 2002, the results of which implied that that file-sharing had no effect on CD sales).

²⁵⁴ Adam Woods, *iTunes Sounds the Alarm Apple's Music Download Service Operates on Wafer-Thin Margins, Posing Big Problems for Potential Competitors*, FIN. TIMES, Apr. 6, 2004, at 2 (relating that Apple "can afford to run . . . iTunes as a loss leader because it fuels iPod sales.").

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pay money for music, because I think it's really important that we do maintain some sense of the value of what it costs to create a record, produce a record, market a record and put it out there.

In terms of the effect of the download market on record sales, I think it is a very complicated issue. The RIAA, our industry organization, has published various survey results that seem to suggest otherwise.²⁵⁵

I think that were a number of factors that had been going on at the same time that Napster was taking off. You were seeing a burst in the Britney Spears teen market, absolutely. There were other factors that were coming together. But I, in my heart of hearts, do believe that unauthorized downloading has had an economic impact on our industry. Whether it's responsible for the full 21% drop in sales or whether it's responsible for 10% or 5% or 17%, I don't know. But I disagree that it had no effect on it.

PROF. HANSEN: Okay. We may have time for one, maybe two, depending how long the question is and the answer.

QUESTION: Hi. I'm Mark Francis, a student here at Fordham.

What do you think is going to happen as far as Congress—they were dealing with the Induce Act, which didn't really go anywhere—do you think Congress is going to get involved at all?²⁵⁶ Do you think if the recent music file-sharing cases make it

²⁵⁵ See Kathy Gilsinan, *Downloads Don't Harm Record Industry, Says Study*, COLUM. DLY. SPECTATOR (OH), Apr. 13, 2004 (reporting that the RIAA issued a press release criticizing the Oberholzer-Gee study); David McGuire, *Study: File-Sharing No Threat to Music Sales*, Mar. 29, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A34300-2004Mar29?language=printer> (reporting that the RIAA "points to data showing that CD sales fell from a high of more than \$13.2 billion in 2000 to \$11.2 billion in 2003—a period that matches the growth of various online music piracy services."). But see Suw Charman, *Online: Listen to the flip side: New research suggesting that file sharing has no impact upon sales of CDs has, not surprisingly, angered the music industry*, GUARDIAN (UK), July 22, 2004, at 19.

[T]he music industries in the US and the UK have based their policies on, at best, incomplete research. At worst, the surveys and analyses they quote are misleading and inaccurate. . . . Some even question whether the fall in sales the RIAA quotes is real or a product of a creative redefinition of the word 'sale'.

Id.

²⁵⁶ Inducing Infringement of Copyrights Act of 2004 (Induce Act), S. 2560, 108th Cong. (2004). See Sonia K. Katyal, *Privacy v. Piracy*, 7 YALE SYMP. L. & TECH. 222, 222 n.6 (discussing the proposal of the Induce Act, which "aimed to hold software creators liable

to the Supreme Court, do you think the Supreme court is going to handle it in one way or the other? What would you like to see them do?²⁵⁷

MR. SALVO: I would like to see them go to the Supreme Court, if for no other reason than to go down and watch Fred argue the case.²⁵⁸ I don't know. I'm going to turn it over to Marybeth because this is really my bailiwick, and she has been monitoring events down in Washington far more closely than I have.

MS. PETERS: I didn't hear which act you talked about.

QUESTIONER: The Induce Act.

MS. PETERS: The Induce Act. Actually we were the ones in the middle.²⁵⁹ It is very clear that Senator Hatch is committed to trying to solve this problem, and he sees solving it by making it clear that there is liability for people whose business models are to make their money from illegitimate use of content.²⁶⁰ Now, how he gets there I'm not sure. Time ran out.

My own personal view is that I find it very difficult to see how we will ever accomplish that because there is nothing for the

for the infringing activities of their consumers," but was shelved due to outcry by technology companies, and legislators' attitudes toward legislating against copyright infringement through file-sharing); Tom Zeller, Jr., *Senate Bill Aims at Makers of File-Sharing Software*, N.Y. TIMES, Sept. 30, 2004, at C7 ("[T]he language of the bill would hold liable anyone who 'intentionally aids, abets, induces or procures' copyright infringement.").

²⁵⁷ See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1104 (9th Cir. 2004), cert. granted, 125 S. Ct. 686 (2004) (holding that companies that sell file-sharing software are not liable for copyright infringement that results from use of the software over which they have no control).

²⁵⁸ See *MGM v. Grokster*, at http://www.eff.org/IP/P2P/MGM_v_Grokster/ (last visited May 4, 2005).

²⁵⁹ But see *Efforts to Curb Illegal Downloading Copyrighted Music, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Peters Induce Act Testimony*] (statement of Hon. Marybeth Peters, Register of Copyrights) (stating that the Copyright Office supports the Induce Act).

²⁶⁰ See Katyal, *supra* note 2566 (quoting an article which reported that "[d]uring the summer of 2003, Senator Orrin Hatch proposed destroying the computers of individuals who illegally download material, pointing out that damaging someone's computer 'may be the only way you can teach somebody about copyrights.'"); Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millenium*, 59 U. PITT. L. REV. 719, 726-727 (positing legislation that would protect copyright owners from internet-related infringement).

technology companies to ever agree to that, especially as long as the *Sony* case interpretation with regard to secondary liability is the test that it is.²⁶¹

With regard to *Grokster*,²⁶² actually I'm on record as saying that the *Sony* case at the time was limited to a home tape recorder for time-shifting purposes over your TV, and they really did think that they were achieving a balance.²⁶³ Today you don't have a balance because I know of no technology that can't meet the *Sony* standard of not being capable—merely capable—of some substantial non-infringing uses.²⁶⁴

So I actually hope that the Supreme Court does take the case. The Copyright Office actually has been trying to convince the Solicitor General to weigh in at this stage to tell the Court that they should accept the petition for cert.²⁶⁵ However, the Solicitor General does not really weigh in unless there is a government interest, like constitutionality, being charged.²⁶⁶ We found out that

²⁶¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (holding that if copying equipment is “capable of substantial noninfringing uses,” then the sale of such a product does not create secondary liability).

²⁶² See generally *Grokster Ltd.*, 380 F.3d 1154.

²⁶³ *Peters Induce Act Testimony*, *supra* note 25959.

There is also no dispute that the use of these [file-sharing] services constitutes copyright infringement - unlike the *Sony* case which held that the principal use of the VCR was a fair use. It is also undisputed that the defendants who operate these services rely on the copyright infringement as a draw to attract users, thereby attracting advertisers. These facts make the comparison to *Sony* remarkably inapt. In my view, if the VCR had been designed in such a way that when a consumer merely turned it on, copies of all of the programs he recorded with it were immediately made available to every other VCR in the world, there is no doubt the *Sony* decision would have gone the opposite way.

Id.

²⁶⁴ *Sony*, 464 U.S. at 442.

²⁶⁵ See George F. Fraley, III, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1227–1251 (1996) (discussing the Solicitor General's role and duties); cf. *Copyright Royalty and Distribution Reform Act of 2003: Hearing on H.R. 1417 Before the Courts, the Internet, and Intellectual Prop. Subcomm., House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Hon. Marybeth Peters, Register of Copyrights) (stating that the Copyright Office gives the Solicitor General advice and assistance on cases pending in the Supreme Court).

²⁶⁶ Cf. Todd Lochner, *The Relationship Between the Office of the Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549 556–558 (1993)

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they have weighed in four times, but there were government employees involved or something.²⁶⁷

It's not over yet. They had a meeting yesterday with all the government agencies. We went and argued.²⁶⁸ But I don't think the government is going to weigh in. So it really will be up to the Supreme Court to decide whether or not they are going to grant cert.

I think they should grant cert. for many reasons. I think it is an important case. Although many people say there is no split in the circuits, I think there is not a workable test and I think that you cannot resolve *Aimster* with *Grokster*.²⁶⁹ I think that the way the Ninth Circuit handled it you could come out that way, but I don't think that the Ninth Circuit analyzed it right.²⁷⁰ So I am hoping

(discussing the process by which the Solicitor General petitions the Supreme Court for certiorari).

²⁶⁷ *Cf. id.*

²⁶⁸ See Fraley, *supra* note 265 at 1248-1249, 1256-1257 (discussing the relationship between the Office of the Solicitor General and independent agencies); *id.* at 567-570 (same).

²⁶⁹ See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1104 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004) (finding file-sharing software providers not liable for contributory infringement by users of their software); *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003) (finding file-sharing software providers liable for contributory infringement by users of their software); *Peters Induce Act Testimony*, *supra* note 259.

[A]pplication of the secondary liability doctrines in the peer-to-peer context has produced conflicting results. On the one hand, the Napster and Aimster services were found to be liable by the Ninth Circuit and Seventh Circuit, while, on the other hand, Grokster and Streamcast were not found liable by the Central District of California.

Id.

²⁷⁰ *Peters Induce Act Testimony*, *supra* note 25959.

The court employed an unnecessarily cramped view of existing secondary liability doctrines, creating a much narrower test of 'knowledge', 'material contribution' and 'right and ability control' than any case before it, including the Ninth Circuit's decision in Napster. It also misapplied the Sony decision to an inaccurate characterization of the defendants as mere providers of software, comparing them to maker of a VCR, when their services were functionally the equivalent of Napster and Aimster. Most importantly, the Grokster decision fails to see the forest for the trees; it essentially ignores defendants' intent to establish and create a network of massive infringement - by enlisting ordinary consumers to engage in piracy - upon which they have built their business.

Id.

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that the Supreme Court does take it and does come up with a balanced test that we could apply.

I actually suggested that if the Supreme Court does not do that, that Congress should legislate a different test, and I can tell you that the likelihood of that ever getting enacted is like [gestures].

PROF. HANSEN: This is a good final question. Let's go down the panel. I know Fred is chomping at the bit over there. What do you think of *Grokster*?²⁷¹ Will the Supreme Court grant cert.; and, if they do so, what do you think they would do?

MR. VON LOHMANN: The Supreme Court is not going to grant Cert. in *Grokster*. The reason they are not going to grant cert. in *Grokster* is because of the Induce Act.²⁷² The *Betamax* case²⁷³ is, at its heart, about deference to the legislature when it comes to matters of copyright policy.²⁷⁴ When Congress is in the midst of wrestling with the exact issue that the plaintiffs in the *Grokster*²⁷⁵ case want the Supreme Court to resolve for them, I can't imagine that the Court is going to say, "Oh yeah, well, you know, we're really in the business of taking these cards out of Congress' hands and legislating solutions for them."

Now, if Congress is unable to come up with a new test for *Betamax*,²⁷⁶ then I think that is the right democratic process working for copyright law. I really don't see the Court as having to step in. We will know one way or another probably by December 17th.

PROF. HANSEN: If they grant cert., what would the Supreme Court do in your opinion, Fred?

²⁷¹ *Grokster Ltd.*, 380 F.3d 1154. This case was granted certiorari on Dec. 10, 2004.

²⁷² See Buttery, *supra* note 226 (describing the history of ASCAP's blanket licensing litigation).

²⁷³ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁷⁴ *Id.* at 431.

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Id.

²⁷⁵ See *Grokster Ltd.*, 380 F.3d at 1157 (9th Cir.).

²⁷⁶ See *Sony*, 464 US at 442.

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MR. VON LOHMANN: If they grant cert., it means four Justices think the Ninth Circuit got it wrong, which means I still win because five think they got it right.

PROF. HANSEN: How much money would you actually put on that, Fred? We may be able to do a little deal here.

MR. VON LOHMANN: It seems to me that we as a nation are putting about \$1 trillion it, because the future of our IT industry will depend on it.

PROF. HANSEN: All right.

Marybeth?

MS. PETERS: Actually, I have read a lot of stuff that basically says this is an issue for the legislature.²⁷⁷ But it is a contributory infringement issue. It is one that has been determined by the courts,²⁷⁸ and the flexibility that the courts give it I think is important. I think this is an issue that the Supreme Court could settle. You should never look to the legislature for something like this. It is only when the courts actually don't get it right that I think that you have a chance of getting legislation.

I think if the Supreme Court takes the case—and I think it's 50/50—I think that they will create a new test that has to be better than the one that we have now.²⁷⁹ Whether we think it is the right test or not, I don't know. It is going to be very hard to pick.

PROF. HANSEN: So they will reverse the Ninth Circuit?

MS. PETERS: Yes.

PROF. HANSEN: Okay.

Joe?

²⁷⁷ See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001) (holding that issues of public policy involving the First Amendment and copyright infringement caused by software decryption are for Congress to decide); David A. Rice, *Copyright and Contract: Preemption After Bowers v. Baystate*, 9 ROGER WILLIAMS U. L. REV. 595, 635. “Judicial respect for the exclusively statutory character of copyright underpins the often expressed preference to leave important unsettled issues for Congress whenever that is possible.” *Id.*

²⁷⁸ See, e.g., *Grokster Ltd.*, 380 F.3d 1154, 1157; *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003); *Corley*, 273 F.3d 429.

²⁷⁹ See *Sony*, 464 US 417.

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MR. SALVO: I think that the numbers are a little bit better for them accepting cert. than Marybeth. I might put it at 55/45. I think it is a close call, but I think the Supreme Court will accept it. I think that if they do accept it, like Marybeth, I think that the case screams out for some sort of guidance in terms of what the standard should be. I think it's going to depend on whether or not Ruth Ginsburg can pull together the same sort of group of Justices as she did with the *Sonny Bono* case.²⁸⁰ But I am hopeful, and maybe it's just because of my perspective as a copyright content lawyer.

MS. PETERS: Just remember, the *Sony* case was 5-4 and it was flipped at the rehearing.²⁸¹

PROF. HANSEN: In terms of the *Sony* case, the whole idea that *Sony* was based on deference to the legislature is ridiculous. There is legislation in—

MR. VON LOHMANN: Oh, our immoderator again.

PROF. HANSEN: There was legislation in Congress at the time they granted cert.²⁸² Now, this was a Ninth Circuit case that they were remanding for the remedy.²⁸³ So before the Supreme Court acts before knowing whether there was going to be a remedy

²⁸⁰ *Eldred v. Ashcroft*, 534 U.S. 1126 (2002) (upholding the constitutionality of the Sonny Bono Copyright Term Extension Act).

²⁸¹ *Cf.* Matthew W. Bower, *Replaying the Betamax Case for the New Digital VCRs: Introducing Tivo to Fair Use*, 20 CARDOZO ARTS & ENT. L.J. 417, 427 (2002) (relating that in the *Sony* case “[t]he Supreme Court failed to render judgment upon initial arguments, and it was only after rehearing that a narrow 5-4 majority emerged to reverse the court of appeals decision.”).

²⁸² Gary S. Lutzker, *Dat's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991- Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 171 (1992).

[T]hree days after the Ninth Circuit handed down its decision in the *Sony* case, Senator DeConcini (D-Ariz.) and Representative Parris (R-Va.) introduced legislation to exempt private noncommercial home video taping from copyright liability (footnote omitted). Subsequently, Senator Mathias (D-Md.) and Representative Edwards (D-Calif.) introduced amendments that would have required the manufacturers of audio and video recorders and tape to pay royalties to copyright owners (footnote omitted).

Id.

²⁸³ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 977 (9th Cir. 1981), *rev'd by a divided court*, 464 U.S. 417 (1984), *reh'g denied*, 465 U.S. 1112 (1984) (remanding the case to the district court).

or not, whether it was going to be damages or maybe a compulsory license. Plus, there were at least two in Congress at that time responding to the Ninth Circuit's opinion.²⁸⁴ The Supreme Court did not defer to Congress. It barged in, grabbed that case, pulled it away from the Ninth Circuit.

Five Justices, until Sandra Day O'Connor switched, would have gone the other way.²⁸⁵ And Stevens gives lip service to deferring to Congress but does not defer either. He does not leave the issue to Congress but rather creates a new a new rule covering contributory infringement of copyrighted works and technology.²⁸⁶

When is Congress ever really deferred to as a matter of policy by anybody? And certainly the Supreme Court doesn't have a history in IP deferring action until Congress has lead the way.²⁸⁷

But the problem is—and I agree with Fred on this—that that little spurt of activity in Congress on the proposed Induce Act might have caused something of a problem with cert.²⁸⁸ Before that I thought cert. was a 100% certainty. Now it is a little more problematical.

²⁸⁴ See James F. Fitzpatrick and Cary H. Sherman, *97th Congress Reconciles Few Copyright Debates*, LEGAL TIMES, Feb. 7, 1983, at 18. (reviewing the various copyright legislations that were proposed in the 97th Congress).

²⁸⁵ See Drew Clark, *The Battle Between Tinseltown and Techtown*, WASH. POST, Apr. 10, 2005, at B04 (“The 5-4 decision was unusual because Justice Sandra Day O’Connor switched sides late in the session, forcing the case to be reargued the following term. She eventually joined the opinion of Justice John Paul Stevens. . .”).

²⁸⁶ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 585 (1984) (writing for the majority, Justice Stevens states that when technology changes the market for copyrighted works, the Court should defer to Congress).

²⁸⁷ In *Eldred*, the Supreme Court did say it was deferring to Congress on copyright policy but only in the context of whether Congress had power to pass the Term Extension Act under the Copyright and Patent Clause. This is standard constitutional analysis on the power of Congress. Its discussion, however, indicated that he had no trouble with the reasons put forward for passing the Act. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (responding to petitioners’ challenge to the Sonny Bono Copyright Term Extension Act on constitutional grounds that “the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause” and “[t]he wisdom of Congress’ action . . . is not within our province to second guess.”).

²⁸⁸ See *supra* text accompanying notes 2722–2766 (positing that the introduction of the Induce Act in Congress will prevent the Supreme Court from granting certiorari to the *Grokster* case).

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If the Court does grant cert., it's 100% certain that they will reverse. I said this at the Fordham 12th Annual Conference on International Intellectual Property Law & Policy this last April [2004], and I'll reaffirm it here.

The first reason is that *Sony* was a 5-4 decision with an unusual history leading to that close vote. If the Court actually believed in *stare decisis*, this would not be the case to be followed blindly. The case was argued in the Supreme Court on January 18, 1983 and reargued the next term on October 3, 1983, a clear indication that the Court was having trouble deciding the case. Then, the outcome was originally 5-4 the other way, with Justice Blackmun writing the majority opinion and Justice Stevens, the dissent. Observant court watchers knew this as soon as it was decided because the structure of Justice Blackmun's dissent—long recitation of the facts and detailed discussion of the merits—read like a majority opinion and sharply contrasted with Stevens' majority opinion, which read more like a dissent—relatively little discussion of the facts and lack of detailed analysis of the merits. For instance, Justice Stevens's fair use discussion did not even cover all of the four statutory factors and the factors that it did discuss included conclusory language but little analysis.

Based upon voting in Supreme Court IP cases, the most likely justice in the majority to have switched sides was Justice O'Connor. When Thurgood Marshall's judicial papers were opened to the public in the Library of Congress after his death, this view of Justice O'Connor's switch was confirmed. Thus, *Sony* was much like a premature baby in that its birth was problematical and underweight.

Second, O'Connor's vote switch might not have been solely based upon the IP merits. If you look at that period 1982-84, O'Connor and Blackmun were having heated disputes in constitutional law cases concerning federal/state federalism issues and abortion.²⁸⁹ Blackmun also made remarks about Justice

²⁸⁹ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (invalidating sections of the City of Akron's abortion ordinance; Justice O'Connor in her dissent attacked the majority decision in *Roe v. Wade*, an opinion written by Blackmun); *Ferc v. Miss.*, 456 U.S. 742, 767 n.30, 769 n.32 (1982) (writing for the majority, Justice Blackmun criticized Justice O'Connor's dissent: "While . . . rhetorical devices make for

O'Connor in television and print interviews that were unprecedented.²⁹⁰ Absent these unusual circumstances, I doubt she would have changed her vote as losing a majority is considered the worst thing that can happen to a justice. An indication of the effect such a switch has on the justice is the fact that seven years later Blackmun could not bring himself to concur in O'Connor's opinion for a unanimous Court in *Feist*. He concurred only in the judgment but did not write a concurring opinion to explain why.²⁹¹ It was not surprising that he did not write a concurring opinion because his only reason was apparently payback for *Sony*, as pathetic as that was.

The third reason that *Grokster* will be reversed is that no court has followed the broad test in *Sony*. The *Napster*, *Aimster* and *Grokster* courts of appeals' decisions only gave *Sony* lipservice. [insert cites in footnotes]. They all applied tests very different from the "capable of substantial non-infringing uses" standard to determine whether there was liability. The Ninth Circuit in *Napster* used the *Sony* standard but only to determine whether actual knowledge or constructive knowledge of end-user infringements was required to find contributory infringement. Judge Posner in *Aimster* claimed that *Sony* applied a "cost-benefit trade-off" analysis and he went on to use his own new balancing test. The Ninth Circuit in *Grokster* claimed to follow *Napster* but then devised a knowledge test that produced, in effect, a "blind eye" to *Grokster*'s intent. Thus, so far, at least, *Sony* as precedent, with a troubled birth, has yet to grow to full adulthood.

The fourth reason that *Grokster* will be reversed is that the Supreme Court has not, particularly recently, shown itself susceptible to arguments that copyright protection is trumped because of concerns about the public domain or disadvantages to

absorbing reading, they unfortunately are substituted for useful constitutional analysis. For while Justice O'Connor articulates a view of state sovereignty that is almost mystical, she entirely fails to address our central point . . . [t]hese apocalyptic observations, while striking, are overstated and patently inaccurate. . .").

²⁹⁰ See *Justice Gives Details on the Inner Workings of the High Court*, N.Y. TIMES, Dec. 5, 1982, at 49 (reporting that Justice Blackmun had recently "clashed" with Justice O'Connor).

²⁹¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 341 (1991).

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disseminators or the public of not being able to use works without authorization or payment.²⁹²

The final reason is that a look of the current justices on the Court does not produce the votes needed to affirm *Grokster*. Of those justices who were on the Court in *Sony*, you have three remaining: Stevens, who wrote the majority decision, O'Connor, who concurred in it and (then) Justice Rehnquist, who joined Blackmun's dissent.²⁹³ Rehnquist has shown in recent oral arguments and votes that he is generally a proponent of IP protection.²⁹⁴ O'Connor has generally been in favor of IP protection. Stevens has been the most anti-intellectual property member of the current Court.

Of the others, Ginsburg and Kennedy have shown strong support for IP. Souter is perhaps not as strong as Ginsburg and Kennedy but he has consistently demonstrated support. Scalia and Thomas are the IP agnostics but I don't see them voting to affirm. The only person I can see for sure voting to affirm the Ninth Circuit is Stevens. His frequent anti-intellectual property votes as a justice are derived, I think, from his early years (1950s and 60s) as antitrust lawyer in the Warren Court era in which antitrust was used to limit intellectual property protection. But he has always been an "independent" on the Court who has not sought and, in my view, has not had influence on other justices.

MR. VON LOHMANN: And Breyer.

PROF. HANSEN: Breyer is a possibility. Breyer is definitely a possibility. But I really don't see any more than these two justices who would vote to affirm the Ninth Circuit. And I think the Court

²⁹² The strongest example is perhaps *Eldred* where the federal term extension act was attacked on various public domain and interest arguments. The Court rejected them and, more importantly, gave them no credence. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (noting that term extensions violate the First Amendment when Congress has not altered the traditional contours of copyright protection).

²⁹³ See *Sony*, 464 U.S. at 418. Justice Stevens wrote for the majority in which Chief Justice Burger and Justices Brennan, White, and O'Connor concurred, and Justice Blackmun filed a dissenting opinion, in which Justices Marshall, Powell, and Rehnquist joined. *Id.*

²⁹⁴ See, e.g., oral argument in *Mosely v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

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will not rely upon *Sony*, and certainly not the Ninth Circuit reasoning, but will come up with some other test to reverse.

And Marybeth is quite right, the whole idea of secondary liability/contributory infringement is judge-made law.²⁹⁵ They never have deferred to Congress,²⁹⁶ and won't do it here.

So my hope is they grant cert. Fred, if you want to actually put some real hard cash on this, I'd be up for that.

MR. VON LOHMANN: If they take cert., you're on.

PROF. HANSEN: Okay. How much?

MR. VON LOHMANN: Let's see if they take cert.

PROF. HANSEN: Thank you very much to our distinguished panel and to the audience for their questions [applause].

²⁹⁵ See *supra* text accompanying notes 277-279 (asserting that the *Sony* contributory infringement test is judge-made law).